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SEP 29 1930

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 44.

THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY, *et al.*,
Appellants,

v.

THE UNITED STATES OF AMERICA, *et al.*,
Defendants.

BRIEF ON BEHALF OF APPELLANTS.

F. H. MOORE,
W. E. DAVIS,
E. T. MILLER,
M. G. ROBERTS,
J. R. BELL,
G. H. MUCKLEY,
H. H. LARIMORE,
C. S. BURG,
J. R. TURNEY,
ROBERT THOMPSON,
Solicitors for Appellants.

SAMUEL W. MOORE,
of Counsel.

September 29, 1930.

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Argument:

I. The Commission failed to obey the command of the statute, and exceeded its statutory power in basing its order upon average conditions of the two groups of carriers, and not upon the condition of each individual carrier to be shown by specific evidence applicable to it or by typical evidence applicable to all. The evidence and the reports of the Commission show conclusively that the conditions of the individual carriers in each group are so widely dissimilar that substantial justice cannot be done to individual carriers by an order based on averages, and without consideration of each individual carrier as a separate problem. The Commission's order, therefore, is invalid, and should be set aside..... 29

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IN THE

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No. 44.

THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY, THE FORT WORTH & DENVER CITY RAILWAY COMPANY, THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY, HOUSTON & SHREVEPORT RAILROAD COMPANY, HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, THE HOUSTON EAST & WEST TEXAS RAILWAY COMPANY, INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, LOUISIANA & ARKANSAS RAILWAY COMPANY, LOUISIANA RAILWAY & NAVIGATION COMPANY, LOUISIANA WESTERN RAILROAD COMPANY, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS, MISSOURI PACIFIC RAILROAD COMPANY, MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP CO., NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS, SAN FRANCISCO & TEXAS RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS, SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY, TEXAS AND NEW ORLEANS RAILROAD COMPANY, and THE TEXAS & PACIFIC RAILWAY COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, WILLIAM W. WHEELOCK and WILLIAM G. BIERD, Receivers of THE CHICAGO & ALTON RAILROAD COMPANY; CHICAGO & EASTERN ILLINOIS RAILWAY COMPANY, CHICAGO & NORTH WESTERN RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, CHICAGO GREAT WESTERN RAILROAD COMPANY, CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, W. H. BREMNER, Receiver of MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY; MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY CO., and WABASH RAILWAY COMPANY,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

BRIEF ON BEHALF OF APPELLANTS.

Statement.

1. References to official reports of decisions of the lower court and the Commission.

The official report of the district court's decision in this case appears in 36 F. (2d), at pages 789, *et seq.*, and in the record (R. 1318-1339). The reports of the Commission and the order whose validity is attacked herein are contained in two reports, viz., I. C. C. Docket No. 15234, IN THE MATTER OF DIVISIONS OF FREIGHT RATES IN WESTERN AND MOUNTAIN-PACIFIC TERRITORIES, 148 I. C. C. 457 and 156 I. C. C. 94 (R. 55-109). The order appears at pages 109-113 *of the record.*

2. Proceedings before the Commission.

The Commission's order which is challenged in this case was entered on June 10, 1929. It purported to fix and readjust divisions between certain carriers known as the Western Trunk Lines and certain carriers known as the Southwestern lines. The effect of the order is to take approximately $3,000,000 per annum from the Southwestern carriers, regardless of their widely varying degrees of financial strength and weakness, and turn it over to both the strong and the weak Western Trunk Line carriers, some of whom, such as the Burlington and the Illinois Central, are among the most prosperous roads in the country (R. 1226). This amount is 7.3 per cent. of the total annual

revenue heretofore received by the Southwestern respondents from their divisions on the traffic to which the order applies.

The proceedings before the Commission resulting in said order will now be briefly summarized.

On the 8th day of October, 1923, the Interstate Commerce Commission, "having under consideration the matter of divisions of freight rates and charges in Western and Mountain-Pacific territories", entered, on its own initiative, upon an investigation,

> for the purpose of determining whether the divisions of said rates or charges are, and for the future will be, unjust, unreasonable, inequitable or unduly preferential or prejudicial as between or among the respondent carriers hereinafter named, within the meaning of paragraph (6) of Section 15 of the Interstate Commerce Act, with a view to prescribing just, reasonable and equitable divisions of rates and charges to be received by the several carriers in the event that existing divisions are determined to be unjust, unreasonable, inequitable or unduly preferential or prejudicial (R. 1169-1171).

On August 26, 1925, the Interstate Commerce Commission entered upon the portion of the investigation which is involved in the present suit. The order entered on that date (R. 1173), provided:

> Evidence will be received only with respect to divisions between Western Trunk Line territory and Southwestern territory.

On September 8, 1925, the Commission made a further order, in which it defined the terms "Southwestern territory" and "Western Trunk Line territory".

Southwestern territory was defined by the Commission as embracing the following states: Texas, Arkansas, Oklahoma, Louisiana west of the Mississippi River, and Missouri south of the main line of the Missouri Pacific Railroad between Kansas City and St. Louis (R. 56-57).

Western Trunk Line territory was defined by the Commission as embracing the following states: Iowa, Minnesota, Wisconsin, Illinois, North Dakota, South Dakota, Missouri north of the main line of the Missouri Pacific Railroad between Kansas City and St. Louis, and the upper peninsula of Michigan.

The order extended the scope of the inquiry to traffic moving over Western Trunk Line carriers as intermediate lines, and having origin or destination in certain Eastern territory as follows (R. 1173-1174):

> It should also be understood that among the divisions involved are those that apply in subdividing the revenue accruing to respondents out of joint rates on traffic moving through western trunk line territory between points in southwestern territory and points in the territory east of the Illinois-Indiana state line, on and north of the Ohio River and on and north of the lines formed by the Chesapeake & Ohio, Norfolk & Western, and Virginian railways between Cincinnati, Ohio, and Norfolk, Virginia, including the New England states, New York, and the lower peninsula of Michigan.

A comparatively small number of the carriers, all or a part of whose lines of railroad are located in the said Western Trunk Line territory and Southwestern territory,[1]

[1] The order was not made to apply to divisions on joint rates on traffic via Kansas City to and from points in Oklahoma on the lines of the Santa Fe, Rock Island and Missouri Pacific because they had effected a compromise as to divisions on that traffic (R. 109, 59).

were made respondents. Of the 44 Class I carriers in Western Trunk Line territory, 15 were made parties. Of the 37 Class I carriers in Southwestern territory, 26 were made parties. None of the Class II or Class III carriers in either territory was made a party. In Exhibit "A" are shown all carriers in both groups. The names of those made parties to this proceeding are printed in italics.

Attorney-Examiner Disque, who conducted the hearings, made the following explanation of the theory upon which the parties to the proceeding were selected (R. 924-925):

> Exam. Disque: That list (of respondents) was made up by Mr. (Commissioner) Potter and myself. We did not want to bring in the short lines in different parts of the west and have them petitioning us for increased divisions. This was started as a trunk line railroad proposition. It was started as a proposition to settle the disputes between the important carriers, and that is the reason we left out the small ones, also for the reason that we thought that it would simplify the case. Any divisions fixed for the large lines would ultimately control the divisions fixed for their smaller sisters.

The names of the carriers which were designated as respondents in the Commission's report and order, and were termed, respectively, complainants and defendants by the Commission (R. 57-58), are given in a footnote.[2] Of these

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[2] Complainants: Chicago & Alton Railroad Company, Chicago & North Western Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago Great Western Railroad Company, Chicago, Milwaukee & St. Paul Railway Company, Chicago, St. Paul, Minneapolis & Omaha Railway Company, Illinois Central Railroad Company, Minneapolis & St. Louis Railroad Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Quincy, Omaha & Kansas City Railroad Company, Chicago & East-

carriers, the Chicago & Eastern Illinois Railway Company, Wabash Railway Company, Louisiana Railway & Navigation Company of Texas and Texarkana and Fort Smith Railway Company had never been made parties respondent (R. 1170-71, 1174).

The Southwestern respondents filed a motion to require all the Southwestern carriers to be made parties. This motion was overruled by the Commission (R. 1174, 1182).

As before stated, this was a proceeding by the Commission of its own motion. There was no complaint filed, nor were there any pleadings of any nature whatsoever. There

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ern Illinois Railway Company, and Wabash Railway Company. The Minneapolis, St. Paul & Sault Ste. Marie Railway Company, however, took no part in the proceeding.

Defendants: Atchison, Topeka & Santa Fe Railway Company; Beaumont, Sour Lake & Western Railway Company, Chicago, Rock Island & Gulf Railway Company, Chicago, Rock Island & Pacific Railway Company, Fort Worth & Denver City Railway Company, Galveston, Harrisburg & San Antonio Railway Company, Gulf, Colorado & Santa Fe Railway Company, Houston & Shreveport Railroad Company; Houston & Texas Central Railroad Company, Houston East & West Texas Railway Company, International-Great Northern Railroad Company, Kansas City, Mexico & Orient Railway Company, Kansas City, Mexico & Orient Railway Company of Texas, Kansas City Southern Railway Company, Oklahoma & Gulf Railway Company, Kansas, Oklahoma & Gulf Railway Company of Texas, Louisiana Railway & Navigation Company, Louisiana Railway & Navigation Company of Texas, Louisiana Western Railroad Company, Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas, Missouri Pacific Railroad Company, Morgan's Louisiana & Texas Railroad & Steamship Company, New Orleans, Texas & Mexico Railway Company, Panhandle & Santa Fe Railway Company, St. Louis, Brownsville & Mexico Railway Company, St. Louis-San Francisco Railway Company, St. Louis, San Francisco & Texas Railway Company, San Antonio & Aransas Pass Railway Company, Texas & Pacific Railway Company, St. Louis Southwestern Railway Company, St. Louis Southwestern Railway Company of Texas, Texas & New Orleans Railroad Company, Texarkana & Fort Smith Railway Company, and Vicksburg, Shreveport & Pacific Railway Company.

As the Commission states (R. 57-58), the Santa Fe and Rock Island have important lines in both territories.

was no statement made at any time during the taking of testimony as to the specific demands of the Western Trunk Lines. It was the general understanding that they sought additional revenues; but no definite claim was made, and the Southwestern carriers during the whole period of the taking of testimony were not advised of any definite complaint or charge that they were called upon to meet. The uncertainty and confusion created by this extremely informal proceeding is illustrated by excerpts from the record shown in the footnote.[3]

After the taking of a large amount of testimony, which will be referred to more in detail hereafter, the Examiner submitted a proposed report, in which he stated the average results shown for the two so-called groups of railroads in Western Trunk Line territory and Southwestern terri-

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[3] Mr. Towner, attorney for the Western Trunk Lines, respondents, stated, during the taking of the testimony, that the Western Trunk Lines were willing to arbitrate. Mr. Roberts, attorney for the St. Louis-San Francisco Railroad, one of the Southwestern respondents, asked Mr. Towner to state the demand of the Western Trunk Lines as to the divisions (R. 355). After considerable discussion Mr. Towner (R. 356-360) said:

> I would not want to do it. What I am saying is that I cannot do it, but I would like to ask you a question now, if that is all right with you. Just what has the question of what we want got to do with whether or not you will arbitrate?
>
> Mr. Roberts: It has everything to do with it. • • • That is a vital fact for us to know if we are going to arbitrate, just what you are specifically demanding. • • • I would like to know what the Western Trunk Lines specifically are requesting in the form of divisions. Then we can make an answer.
>
> Mr. Towner: We are requesting what is fair and proper and just, but I could not undertake to tell you what is fair and proper and just until I hear all of the evidence. I am certainly no better than the Commission in that respect.
>
> Mr. Roberts: A man who brings a lawsuit usually knows what he wants in advance. I never saw a man who brought a lawsuit who did not know what he wanted. • • •

tory, and recommended that there should be no change by the Commission in the divisions, saying (R. 1212-1213):

> Consideration of groups or averages, however, is often misleading. The revenue which a mileage prorate would transfer to the Western Trunk Lines would go to the Chicago, Burlington & Quincy, Illinois Central and Wabash perhaps as much as it would to the weaker lines, namely the Chicago & Alton, Chicago & Eastern Illinois, Chicago Great Western and Chicago, Milwaukee & St. Paul. This situation argues against a change in divisions for financial reasons. Transfusion of revenue should be undertaken for strengthening weak carriers only in extreme cases and only as a last resort.
>
> No such convincing showing has been made as would justify affirmative action on the part of this commission with respect to the divisions in the

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Mr. Muckley: Usually when you arbitrate something there is a definite dispute about something. Now, what is the dispute? • • •

Mr. Towner: I will state that, as a matter of record, that I do not think the Western Trunk Lines are getting enough money in the divisions of the Southwestern rates.

Exam. Disque: But you are not prepared to say how much more you ought to have.

Mr. Towner: I do not know. How can I tell? • • •

Exam. Disque: It may be at the end of the next hearing Mr. Towner can come forward and tell us that he wants such and such a basis of divisions. It may be that will sound half reasonable to you and you will talk to him about it.

Examiner Disque again took the matter up shortly before the close of the hearing. The following occurred (R. 1109):

Exam. Disque: What do you expect?

Mr. Towner: I expect the Commission to prescribe some sort of mileage basis (6078-6079).

Exam. Disque: What sort of mileage basis, a mile and a half or a mile and a quarter?

Mr. Towner: Whatever the Commission finds to be proper between groups.

See also R. 369, 678-679.

> aggregate, but there is much reason to believe that a constructive revision of individual divisions by the carriers interested would be warranted.

The Commission, however, after hearing arguments upon exceptions to the examiner's report handed down a report in which it held that the existing divisions were not just, reasonable and equitable (R. 86), and prescribed a basis of divisions which it declared to be just, reasonable and equitable (R. 88-90).

The Commission's report (R. 55-93) may be fairly summarized as follows:

The Commission treated the proceeding as involving the divisions of joint rates, not between individual carriers, parties to the joint rates, but between two territories. It said (R. 57):

> This report deals only with the divisions in the aggregate north and south of Kansas City and St. Louis, Mo., and East St. Louis, Cairo, Gale and Thebes, Ill., respectively, of joint rates between points in western trunk-line territory generally east of the Missouri River and points in the Southwest.

The Commission (R. 57) said also:

> The divisions under consideration relate not only to traffic having origin and destination in the territories mentioned, but also include divisions of the western lines' portions of the joint rates on traffic moving between points in the Southwest and points in territory east of the Illinois-Indiana State line and on and north of the Ohio River and the line formed by the Chesapeake & Ohio, Norfolk & Western, and Virginian between Cincinnati, Ohio and Norfolk, Va., including New England and the Lower Peninsula of Michigan (R. 57).

The Commission considered the matter from the standpoint of the two so-called groups of railroads, that is, the Western Trunk Line respondents, which it termed the complainants, and the Southwestern respondents, which it termed defendants, but, as a matter of fact, many of the statistics which it used included statistics as to operations and revenues of other Class I carriers besides the respondents. The statistics also covered the entire operations of the respondents, and were not confined to the traffic here involved, nor to operations in Western Trunk Line and Southwestern territory.

The Commission discussed in a general way the divisions which were in effect, the population of the Western Trunk Line territory and the Southwestern territory, the relative increase in population in the two territories, the growth of agricultural and industrial development in the two territories, and reached the general conclusion that conditions in the Southwestern territory were improving more relatively than in the Western Trunk Line territory, although the population and the amount of agricultural and industrial products in the Western Trunk Line territory greatly exceeded those in the Southwestern territory.

The Commission also stated that the freight rates in Southwestern territory were on materially higher level than the freight rates in the Western Trunk Line territory (R. 69), some of them being 40 to 50 per cent higher (R. 71), and that it appeared that the general level of rates was somewhere in the neighborhood of 25 per cent higher in the Southwest than in Western Trunk Line territory (R. 72). The Commission also stated that the "traffic density was over 50 per cent greater in the Western Trunk Line group than in the Southwest" (R. 74). The Com-

mission, however, reached no definite conclusion from any of these comparisons.

The Commission then stated that (R. 78):

> The vital thing to ascertain here is obviously the relative cost of service in the two groups, and upon that matter traffic density throws only an indirect and not very illuminating light.

The Commission then, from a table showing the average freight operating expenses per ton mile in 1924 of Class I carriers operating within the Western Trunk Line region and Southwestern region, drew the conclusion that it "cost somewhere in the neighborhood of 15 per cent more per ton mile to haul freight in the Southwest than in Western Trunk Line territory" (R. 78). The Commission said:

> Operating expense, however, does not tell the whole story, for there are overhead charges to consider, such as taxes and return on investment, and it is with respect to such overhead that the carriers with the heavier traffic density have the advantage. Average freight revenues per ton mile are from this point of view better criteria, and we have seen that they were somewhere in the neighborhood of 25 per cent higher in the Southwest than in Western Trunk Line territory. But such revenues in turn may be partially misleading, for they may have provided a larger return on investment in the one case than in the other. A still better basis for comparison would obviously be the amounts needed in each case to cover operating expenses, taxes and other like charges, and a fair return on investment (R. 78-79).

The Commission then made a computation of the amount of revenue required to pay the aggregate operating expenses, taxes, and other charges, and a return of 5.75 per

cent. on the aggregate book investment (that is, road and equipment, material and supplies, and cash) in each of the two groups; after making an adjustment for the passenger operating expenses and revenues, it reached the following conclusion as to what the freight revenue per ton mile would have been in the two groups, respectively, *if* the 5.75 per cent. had been earned (R. 83):

> Confining the computations to the strictly group lines, it appears that in 1924 the constructive freight revenue per ton mile was 12.01 mills in Western Trunk Line territory and 14.29 mills in the Southwest, an excess for the latter of 18.9 per cent. The effect of these figures is to indicate that the cost of service, including a fair return on investment, was somewhere in the neighborhood of 20 per cent greater in the Southwest than in the Western Trunk Line group, based on averages of 1923 and 1924 operations, and somewhere in the neighborhood of 17 per cent greater based on 1924 operations.

The Commission continued:

> These figures are, of course, open to the criticism that they are either based upon the operations of systems which extend in some instances beyond group boundaries, or, in the case of the strictly group lines, upon an incomplete showing of group operations. However, there are reasons to believe that they are not unfair to defendants (R. 83).

The Commission stated various considerations which apparently were deemed by it to support the fairness of the above computation of the relative amounts of revenue required by the so-called Western Trunk Line group and the so-called Southwestern group. It made no further find-

ings[4] as a basis for any definite division of the revenue from the joint rates, and concluded that the existing basis of divisions was unjust, unreasonable and inequitable and that to cure those defects the divisions "must be readjusted upon a consistent basis which will as nearly as practicable reflect, in the light of all the facts of record, the differing conditions in the two territories". The Commission did not then proceed to require that the revenue should be

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[4] The Commission did summarize the so-called salient facts as follows (R. 85-6), but, as will be seen, they do not constitute definite findings:

1. That the present divisions were established, for the most part, about 35 years ago and conform to no logical or consistent basis. They are considerably more favorable to complainants in the case of oil and lumber than in the case of other forms of traffic.

2. That transportation conditions have changed materially since most of the divisions were established, and that the change has benefited defendants more than it has complainants. The trend is distinctly in favor of defendants.

3. That transportation conditions are nevertheless more favorable in Western trunk-line territory than in the Southwest, more particularly with reference to density of traffic. However, conditions vary in the different parts of Western trunk-line territory, and appear on this record to be considerably more favorable in Illinois than in the other States included in that region. They grow continually less favorable from east to west.

4. That the difference in transportation conditions is reflected in the level of rates in the two territories. It is not possible from the record to determine just what the difference is in average levels, but it appears to be greater than the difference in average transportation conditions. This is particularly true of the class rates, which have apparently been constructed upon somewhat different theories in the two territories, and are in process of revision in Western trunk-line territory.

5. That the cost of operation per ton-mile, including all expenses, charges, and a fair return on investment, in all probability does not average as much as 20 per cent higher in the Southwestern than in the Western trunk line group.

6. That the financial condition of complainants is not on the whole as good as that of defendants.

divided so as to yield to the Southwestern respondents 20 per cent greater revenue per ton mile out of the joint rates, than was received by the Western Trunk Line respondents, as its above quoted finding would seem to require it to do, but determined that the divisions should be readjusted as follows (R. 86-87):

> Such a readjustment will, we think, be accomplished if the joint rates are divided, south and north of the gateways, in proportion to assumed rates for the two hauls, the assumed rate for the distance covered by the haul south of the gateway to be the first-class rate for that distance under the present southwestern scale, and the assumed rate for the distance covered by the haul north of the gateway to be 80 per cent of the first-class rate for that distance under the same scale in the case of traffic to or from points in Illinois and Wisconsin and 87 per cent in the case of traffic to or from other points in the Western Trunk Line group. Where differentials are added in either territory in making the rates, such differentials should be deducted before prorating and added to the divisions of the lines in the region in which they apply. In the case of traffic to or from points in official territory east of the Indiana-Illinois State line, the assumed rate used in determining complainants' proportion of the revenue accruing to the western lines should be 80 per cent of the first-class rate under the southwestern scale for the distance covered by complainants' haul minus 10 cents because of the absence of originating or delivering service.

No findings were made by the Commission with reference to any individual respondent, although the rates of

return of the individual carriers were shown by a table contained in the Commission's report, reproduced below, to be widely dissimilar, there being carriers in both the Southwestern region and the Western Trunk Line region which were earning only a very small return, and also carriers which were earning 5 or 6 per cent.

	1922 *Per Cent*	*1923* *Per Cent*	*1924* *Per Cent*	*1925* *Per Cent*
Western Trunk Lines:				
Chicago & Alton	1.05	3.59	2.86	2.87
C. & E. I.	3.03	3.82	1.62	2.37
C. B. & Q.	4.52	4.29	4.80	4.60
C. G. W.	.19	1.54	1.59	1.48
C. M. & St. P.	1.90	2.81	2.57	2.27
Illinois Central	5.92	5.17	4.76	4.76
Wabash	1.77	3.84	3.85	4.84
Southwestern Lines:				
A. T. & S. F.	4.61	5.17	4.63	5.16
C. G. & S. F.	6.05	5.67	9.04	7.55
H. & T. C.	4.30	4.44	5.28	4.33
H. E. & W. T.	2.26	1.75	1.91	7.21
I. G. N.	2.87	4.98	5.63	4.52
K. C. M. & O.	Deficit	.22	Deficit	.24
K. C. M. & O. of Tex.	Deficit	Deficit	2.41	.47
K. C. S.	2.88	2.60	2.85	3.49
M. K. T.	4.72	3.78	4.29	4.96
M. K. T. of Tex.	1.63	1.56	5.03	3.28
Mo. Pac.	2.09	2.21	3.81	4.14
St. L. S. F.	3.99	4.72	5.05	5.23
St. L. S. W.	7.05	7.44	4.97	4.81
St. L. S. W. of Tex.	Deficit	Deficit	1.33	1.46
Texas & Pacific	2.72	3.84	4.15	4.11

The Commission's statement, above quoted, did not, however, give the rates of return of all the Western Trunk Line respondents and Southwestern respondents for the years 1922 to 1925, inclusive. Similar data with regard to the other respondents are contained in pages 6-9, inclusive, of Exhibit A-124 (R. 512), as follows:

	Rate of Return			
	1922 Per Cent	1923 Per Cent	1924 Per Cent	1925 Per Cent
Western Trunk Line Respondents:				
Chicago & Northwestern Ry. Co.	3.47	3.04	3.23	4.14
Chicago, St. Paul, Minneapolis & Omaha Ry. Co.	4.11	3.32	3.73	3.46
Minneapolis & St. Louis R. R. Co.	1.32	1.22	†1.42	.36
Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.	3.31	3.75	3.04	4.10
Quincy, Omaha & Kansas City R. R.	†2.63	†2.77	†2.60	†2.67
Southwestern Respondents:				
Gulf Coast Lines	6.85	8.52	9.68	9.79
The Beaumont, Sour Lake & West. Ry. Co.				
New Orleans, Tex. & Mexico Ry. Co.				
St. Louis, Brownsville & Mex. Ry. Co.				
Ft. Worth & Denver City Ry. Co.	7.40	8.63	10.52	9.19
Sou. Pacific Lines in Tex. and La.	2.35	2.43	3.97	3.27
Galveston, Harrisburg & S. A. Ry. Co.				
Houston & Shreveport R. R. Co.				
Louisiana Western R. R. Co.				
Morgan's La. & Tex. R. R. & S. S. Co.				
Texas & New Orleans R. R. Co.				
*Houston & Tex. Central R. R. Co.				
*Houston East & West Tex. R. R. Co.				
Kansas, Okla. & Gulf Ry. Co.	2.80	1.31	.17	† .08
Louisiana Ry. & Navigation Co.	.39	‡ .64	‡1.14	‡1.95
San Antonio & Aransas Pass Ry. Co.	.95	3.12	2.71	**
Vicksburg, Shreveport & Pacific Ry. Co.	3.39	6.16	4.00	5.01

* The rates of return of the Houston & Texas Central R. R. Co. and Houston East & West Texas R. R. Co. were shown in the Commission's table, but the rates of return for the other respondents which form parts of the Southern Pacific System were excluded.

† Indicates deficit.

** Included as part of Southern Pacific Lines in 1925.

‡ Indicates deficit. Includes Louisiana Ry. & Navigation Co. of Tex.

The Commission made no specific findings with reference to the other matters which Section 15 (6) of the Act requires to be taken into consideration. Further, it made no findings with respect to any of those matters as a basis for giving a greater or less division to one carrier or group of carriers than otherwise would be given to such

carrier or group of carriers. With reference to those matters, the Commission said (R. 85):

> Paragraph (5) of section 15 of the interstate commerce act requires us, in determining just, reasonable, and equitable divisions to give due consideration among other things—to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation service of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.
>
> In reaching our conclusions we have taken all these matters into consideration to the extent that the record makes it possible to do so.

The Southwestern respondents filed a petition for rehearing and reconsideration, and to introduce additional testimony showing, among other things, that the divisional formula prescribed by the Commission, instead of yielding to the Southwestern respondents as a group 20 per cent. greater revenue per ton mile, would yield to them only about 5.8 per cent. greater revenue per ton mile, and that the said proposed basis of divisions had never been submitted at the hearings in the above proceeding (R. 28-30, 37). The Commission declined to grant a rehearing or to reopen the case, but made an additional report and entered an order thereon, which in certain respects modified the basis of divisions proposed in the original report. The basis

of divisions prescribed by the Commission can probably be best set forth by quoting the Commission's order, which, omitting formal matters, is as follows (R. 109-113):

> IT IS ORDERED, That of the joint rates for the transportation of property in interstate or foreign commerce via the gateways of Kansas City and St. Louis, Mo., and East St. Louis, Cairo, Gale, and Thebes, Ill., between points on the lines of any of the above-listed respondents in the Southwest, as above defined, and points on the lines of any of the above-listed respondents in the States of Illinois and Wisconsin, the just, reasonable, and equitable divisions in the aggregate, south and north of said gateways, shall on and after August 1, 1929, be determined, subject to the provisos noted below, by dividing said joint rates in proportion to assumed rates for the two hauls, the assumed rate for the distance covered by the haul south of the gateway to be the first-class rate for that distance under the present southwestern scale and the assumed rates for the distance covered by the haul north of the gateway to be 80 per cent., when the gateway is Kansas City, and 75 per cent., when the gateway is St. Louis, East St. Louis, Cairo, Gale, or Thebes, of the first-class rate for that distance under the same scale;
>
> IT IS FURTHER ORDERED, That of the joint rates for the transportation of property in interstate or foreign commerce via the gateways named in the next preceding paragraph between points on the lines of any of the above-listed respondents in the Southwest, as above defined, and points on the lines of any of the above-listed respondents in the remainder of western trunk-line territory east of the Missouri River, as such territory is above defined, eliminating the States of Illinois and Wisconsin, the just, reasonable and equitable divisions in the aggregate,

south and north of said gateways, shall on and after August 1, 1929, be determined, subject to the provisos noted below, by dividing said joint rates in proportion to assumed rates for the two hauls, the assumed rate for the distance covered by the haul south of the gateway to be the first-class rate for that distance under the present southwestern scale and the assumed rate for the distance covered by the haul north of the gateway to be 87 per cent. of the first-class rate for that distance under the same scale.

IT IS FURTHER ORDERED, That of the joint rates for the transportation of property in interstate or foreign commerce via the gateways named in the second preceding paragraph between points on the lines of any of the above-listed respondents in the Southwest, as above defined, and points in the territory east of the Illinois-Indiana State line and on and north of the Ohio River and the line formed by the Chesapeake & Ohio, Norfolk & Western, and Virginian between Cincinnati, Ohio, and Norfolk, Va., the just, reasonable, and equitable divisions in the aggregate, south and north of said gateways, of the shares of said joint rates accruing to above-listed respondents participating therein shall be determined on and after August 1, 1929, subject to the provisos noted below, by dividing such shares in proportion to assumed rates for the two hauls, the assumed rate for the distance covered by the haul south of the gateway to be the first-class rate for that distance under the present southwestern scale and the assumed rate for the distance covered by the haul of western trunk-line respondents north of the gateway to be 80 per cent., when the gateway is Kansas City, and 75 per cent., when the gateway is St. Louis, East St. Louis, Cairo, Gale, or Thebes, of

the first-class rate for that distance under the same scale, minus 15 cents;

PROVIDED, HOWEVER, That where differentials are used in the construction of the joint rates, such differentials shall be deducted before prorating and added to the amounts determined by the prorating process and accruing to respondents in the regions where the differentials apply; and

PROVIDED, FURTHER, That instead of applying the basic prorate formulas prescribed in the above ordering paragraphs to individual joint rates and routes, both territories may be divided, if respondents so agree, into groups, and percentages determined for the division of all joint rates between particular groups by applying the appropriate prorate formula to fair average distances between such groups and the gateways named above; and that respondents for purposes of convenience and simplicity may deviate in other respects from the strict letter of the order if they so agree.

IT IS FURTHER ORDERED, That the above-listed respondents, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on and after August 1, 1929, and thereafter to abstain from asking, demanding, collecting, or receiving divisions of said joint rates upon other bases than those above prescribed.

AND IT IS FURTHER ORDERED, That this order shall continue in force until the further order of the Commission.

It will be noted that the above order does not prescribe the divisions of revenue from the joint through rates on all traffic between Southwestern territory and Western Trunk Line territory. On the contrary, it is limited to traffic

between a point on a Southwestern carrier, which is a respondent in this proceeding, and a point on a Western Trunk Line carrier, which is also a respondent; or, in case of traffic to or from certain eastern territory, the order applies only in the event that the traffic originates or terminates on the line of a Southwestern respondent, and passes over the line of a Western Trunk Line respondent. As to all other traffic the old divisions are left in force. Some curious results follow: for example, if traffic originates or terminates on the line of the Louisiana Railway and Navigation Company, one of the respondents (R. 512, Exhibit A-124), which has a mileage of 343 miles (in later years shown with the Louisiana Railway & Navigation Company of Texas, with a total mileage of 543.71 miles) and has operated at a deficit, or practically a deficit, in each of the years shown in Exhibit A-124, the order of the Commission applies, and that carrier is required to pay increased divisions to the Western Trunk Line respondents; but if the traffic originates or terminates on the line of the Louisiana & Arkansas Railway Company, which is not a respondent, and which is now a part of the same railroad system (Finance Docket 7076, 150 I. C. C. 477), has a mileage of 302.25 miles, and had a rate of return upon its investment of about 5 per cent., the Commission's order does not apply and the latter carrier is not required to pay the increased divisions. If traffic originates or terminates on the line of the Kansas, Oklahoma & Gulf Railway Company, one of the respondents, which has a mileage of 314.42 miles and in the year 1925 was operated at a deficit, the Commission's order applies and that carrier must pay increased divisions to the Western Trunk Line respondents; but if it originates on the line of the Midland Valley

Railroad Company, which is not a respondent, and which has a mileage of 364.04 miles and in the year 1925 had a return upon its investment of 5.63%, the Commission's order does not apply and the Midland Valley is not required to pay increased divisions to the Western Trunk Lines. If the traffic originates or terminates on the line of the Kansas City Southern Railway Company, one of the respondents, the Commission's order applies and the Kansas City Southern is required to pay the increased divisions to the Western Trunk Lines; but if the traffic originates or terminates on the line of the Texarkana and Fort Smith Railway Company which is not a respondent, but is the main line in Texas of the Kansas City Southern (63 I. C. C. 618; R. 1166), the Commission's order does not apply.

The basis of divisions prescribed by the Commission does not consist of percentages applying directly to the rates in question, nor of a rate pro-rate based on the actual rates, nor of a mileage pro-rate applying directly to the actual rates, but consists of percentages which are to be obtained by taking certain percentages of the first class rates under the Southwestern scale and deriving the percentages therefrom (the Commission refers to these percentages of said rate scale as "assumed rates"). The Southwestern scale was established by the Commission, in the Southwestern territory, after the hearing and argument of the proceeding here involved. It is not the scale of rates actually in effect in Western Trunk Line territory (R. 97). This is mentioned for the purpose of calling attention to the difficulty of securing an accurate result when a formula is used which is based on a rate scale different from the rates actually in effect.

The order applies to all of the Southwestern respondents, regardless of their widely varying degrees of financial strength and weakness; and inures to the benefit of the Western Trunk Line respondents regardless of their widely varying degrees of strength and weakness.

No reservation is made in the order of the right to any respondent to apply for adjustments, such as was contained in the New England divisions case, and the importance of which was emphasized by this Court in its opinion in that case (261 U. S. 199, 201).

3. Proceedings in the lower court.

This suit was brought before a statutory court of three judges in the District Court of the United States for the Western Division of the Western District of Missouri, under the provisions of the Urgent Deficiencies Appropriation Act of October 22, 1913, to enjoin, set aside and annul the Commission's order, above referred to. The petition asserted the invalidity of the order, on the ground that it was in excess of the Commission's powers, was arbitrary, unjust, and unsupported by substantial evidence, and upon each and all of the grounds set forth in the specifications of error and the following argument. The Interstate Commerce Commission intervened, as did the Western Trunk Line respondents. All defendants answered, alleging the validity of the Commission's order.

The lower court, on November 27, 1929, entered its order dismissing the plaintiff's petition. An appeal to this Court was duly taken.

4. Finding of probable jurisdiction.

A statement in accordance with paragraph 1 of Rule 12 of the revised rules of this Court, of the grounds on which

the jurisdiction of this Court is invoked, was duly filed, and on April 28, 1930, this Court entered an order finding that probable jurisdiction had been shown (..... U. S. .....; 50 S. C. 350).

Specification of Errors.

The appellants make the following specification of errors:

1. The district court erred in failing to hold the Commission's said order void because it is based on averages only and because the Commission in the said proceeding did not take into consideration, and made no study of, or findings as to, each individual carrier, either on the basis of typical evidence or specific evidence, and also because the evidence, statements and findings in the Commission's report show that the conditions of the individual carriers in each so-called group are not the same, but are widely dissimilar, so that substantial justice cannot be done to the individual carriers by a group order.

2. The district court erred in holding in effect that the Southwestern respondents are estopped from making objections to the validity of the Commission's order because of the manner in which the defense was conducted by the Southwestern respondents, since the proceeding was not conducted upon any definite statement of issues, nor by any framed issues by pleadings, which would enable said respondents to make an adequate defense, or to make an election as to the course to be pursued.

3. The district court erred in failing to hold the Commission's said order void because, as shown by the Com-

mission's reports in said proceeding, none of the said petitioners is earning a fair return upon its investment, and the said order, as to each of said petitioners, is therefore confiscatory.

4. The district court erred in failing to hold the Commission's said order void because in so far as the said order applied to the divisions of joint rates on traffic to and from points east of the Illinois-Indiana State line the Commission did not have all the necessary and proper parties before it, to wit: the railroads operating within the territory east of the Illinois-Indiana State line and connecting with the Western Trunk Line respondents at junctions in the State of Illinois, nor sufficient evidence upon which to prescribe such divisions.

5. The district court erred in failing to hold the Commission's said order void, and against the public interest, because the Commission, after finding that the vital thing to ascertain in fixing divisions as between two groups of carriers selected by the Commission, one group being located in the Western Trunk Line territory and the other group in the Southwestern territory—said territories being defined by the Commission in the said proceeding entitled Docket No. 15234, and the said carriers being the respondents in the said proceeding—was the cost of service, and that a better basis of comparison was the cost of service, including a fair return upon investment (that is, the amount required to pay operating expenses, taxes and other like charges, and a fair return upon investment), and after ascertaining the average cost of service, including a fair return on investment of each of said groups of carriers, made an order fixing a basis of divisions, as between the

said two groups of respondents, which applied indiscriminately to the prosperous and the needy respondents in each territory, regardless of the amount needed by each individual respondent in order to permit it to pay its operating expenses, taxes and like charges, and to earn a fair return on investment, said order granting increased revenues, in many cases, to a Western Trunk Line respondent which was already receiving a higher rate of return than the Southwestern respondent from which such increased revenues were taken by the Commission's order, and in some cases taking revenue from a Southwestern respondent which was operating at a deficit, or receiving a very small return.

6. The district court erred in refusing to hold the Commission's said order void as being based upon no rational, consistent and lawful plan, because, since the said order was based primarily on the needs of the carriers in the Western Trunk Line territory and Southwestern territory, respectively, for revenue to pay operating expenses, taxes and other like charges, and a fair return on investment, an order should have been made which would give increased revenues to the individual carriers which were in relatively greater need thereof and would take such revenues only from the individual carriers which were enjoying relatively higher returns.

7. The district court erred in refusing to hold the Commission's said order void because the Commission made only two definite findings upon what it stated to be the vital considerations as a basis for fixing divisions, namely: (1) That the vital thing to ascertain in the proceeding was the relative cost of service in the Western

Trunk Line territory and the Southwestern territory, respectively, in which respect the Commission found that it cost on an average about 15% more per ton mile to haul freight in the Southwestern territory than in the Western Trunk Line territory, and (2) that a still better basis for comparison was the amounts needed in each case to cover operating expenses, taxes and other like charges, and a fair return on investment, in which respect the Commission found that the average freight revenue per ton per mile needed in Western Trunk Line territory to pay such expenses, taxes and other like charges and a fair return on investment, based on 1924 revenues and expenses, was 12.01 mills per ton per mile, as compared with 14.29 mills per ton per mile in Southwestern territory, an excess for the latter of 18.9%; and that, therefore, the cost of service, including a fair return on investment, was about 20% greater, on the average, in the Southwestern group than in the Western Trunk Line group, based on averages of 1923 and 1924 operations, and about 17% greater, based on 1924 operations; but the Commission, after making the above findings, prescribed a formula for the division of the revenue from the said rates which yields to the respondents in the Southwestern territory only 9% greater average revenue per ton per mile than is received by the Western Trunk Line respondents, without any findings or evidence supporting such action.

8. The district court erred in failing to hold the Commission's said order void for the reason that its decision is based upon such incomplete, general and unreliable evidence and conjectures (such as the use of statistics of operating revenues and expenses of railroads which were not made parties to the said proceeding, and statistics of

operating revenues and expenses from all traffic, and of the entire lines of railroad of said respondents, instead of being confined to the traffic transported under the joint rates involved in this proceeding, and to the portions of said lines of railroad which are located in the Western Trunk Line territory and Southwestern territory, respectively) as prevent the making of reasonably accurate findings as the basis for an order, which order takes a large amount of revenue from one so-called group of carriers and grants the same to another so-called group of carriers.

9. The district court erred in failing to hold the Commission's said order void for the reason that, as shown by the Commission's reports in the said proceeding, the Commission, as to material issues, made findings and entered its order upon assumptions of fact not supported by the evidence before it, and considered matters which were not introduced in evidence.

10. The district court erred in failing to hold the Commission's said order void for the reason that the findings of fact made by the Commission do not sustain its order in the said proceeding, but are inconsistent with and contrary to the said order.

11. The district court erred in failing to hold the Commission's said order void because the said order required the payment of increased divisions by certain of the respondents in the said proceeding, without any consideration whatever by the Commission, as shown by the Commission's reports, of the financial condition of such respondents, and also required the payment of increased divisions to certain respondents, such as the Atchison, Topeka & Santa Fe Railway Company, which opposed the granting

of increased divisions to the Western Trunk Line respondents, and to the Chicago, Rock Island & Pacific Railway Company, which took no part whatever in the proceeding.

12. The district court erred in failing to hold that the Commission's said order is void for the reason that it is palpably arbitrary and palpably unreasonable; also, unsupported by and contrary to the findings of fact and the evidence in the case; also, contrary to the purposes and provisions of the Interstate Commerce Act, and particularly of Section 15(6) thereof; also, contrary to the public interest; and, also, in conflict with the due process clause of the Fifth Amendment to the Constitution of the United States.

ARGUMENT.

I.

The Commission failed to obey the command of the statute, and exceeded its statutory power in basing its order upon average conditions of the two groups of carriers, and not upon the condition of each individual carrier to be shown by specific evidence applicable to it or by typical evidence applicable to all. The evidence and the reports of the Commission show conclusively that the conditions of the individual carriers in each group are so widely dissimilar that substantial justice cannot be done to individual carriers by an order based on averages, and without consideration of each individual carrier as a separate problem. The Commission's order, therefore, is invalid, and should be set aside.

The plain and inescapable effect of the Commission's order, which is challenged in this case, is to take approximately $3,000,000 (Exh. 10, R. 1226) in revenue annually

from certain of the strong and weak carriers alike in the Southwestern group, parties to the proceeding, and to transfer this sum to certain of the strong and weak carriers alike in the Western Trunk Line group, likewise parties to the proceeding. Not only are the stronger carriers in the Southwestern territory required to deplete their revenues for the benefit of the still stronger carriers in the Western Trunk Line territory, but the weak, and even bankrupt, carriers in the Southwestern group, though not earning any adequate return, or any return at all upon their investments, are required to still further deplete their scanty revenues and make substantial contributions to certain carriers in the Western Trunk Line group, some of which are among the most prosperous in the country and have no conceivable right to become further enriched at the expense of their impoverished connections.

The Commission's decisions and order are based upon a consideration of the average conditions of the carriers in each group, and its blanket orders apply alike to all carriers in both groups who are parties to the proceeding, without dealing or attempting to deal with the operating or financial condition of any one of the several carriers who are parties to the joint rates.

Does the statute defining the power and authority of the Commission authorize such a drastic, illogical, unjust and mischievous result, in a proceeding where it exercises *quasi judicial* powers to prescribe "the just, reasonable and equitable divisions" of joint rates to be received by the several carriers parties thereto? We most earnestly and confidently contend that it does not.

We turn to the Commission's statutory authority over the fixation of divisions, and adopt the following statement

thereof as contained in this Court's opinion in *Brimstone R. Co.* v. *United States*, 276 U. S. 104, 109:

Section 1 (4) Transportation Act, 1920, directs common carriers to establish through routes, reasonable and equitable rates, fares and charges; also to establish divisions of joint rates just, reasonable and equitable as between the participants, which shall not unduly prefer or prejudice any of them.

Section 15 (1) empowers the Commission whenever, after full hearing, it shall find any rate charged by a carrier is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential, or prejudicial, or otherwise in violation of this Act, to determine and prescribe the just and reasonable rate thereafter to be observed and to make an order requiring the carrier to cease and desist from such violation.

Section 15 (3) provides that "the Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing," establish joint rates, "and the divisions of such rates, fares, or charges as hereinafter provided."

Section 15 (6)—"Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursu-

ant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

(a) The statute requires the Commission to determine the divisions of each carrier, party to a joint rate, upon a consideration of its own rights and needs, and does not authorize the Commission to base its order fixing divisions for individual carriers upon group conditions or upon average conditions in the group, as has been done in this case.

It seems to us too clear for argument that the Commission's statutory authority is limited to dealing with individual carriers, as their rights and their necessities may

appear, and not with groups or with the averages of groups. It is authorized to deal with divisions of joint rates, and by order to fix "the just, reasonable and equitable divisions thereof to be received by *the several carriers*". Manifestly, each carrier, party to the joint rate, is a partner in a joint enterprise, whose rights are to be determined as the statute provides, as in a proceeding for partition, and each carrier is, therefore, a separate problem, and the Commission is required to deal with it separately, and to determine what divisions are just, reasonable and equitable *to it*. It is not enough that the divisions so fixed may be just, reasonable and equitable to certain carriers in the aggregate, composing a group of which it may be a member, or to the average of the group.

True, the rates and divisions of each carrier may be shown by specific instances which are proven by evidence to be fairly typical of all; but this is merely an indirect method of determining the rates and divisions in each individual instance. It may be that certain carriers in some instances may be shown by evidence, typical of all, to be so similar in location, operating conditions and financial resources that an order fixing divisions might be applicable to all such carriers without substantial injustice; but, clearly, there is no authority in the statute for a sweeping order reducing the divisions applicable alike to all members of a group composed of prosperous carriers, weak carriers, and even bankrupt carriers, for the purpose of affording relief to all members of another group of carriers, some of which are prosperous and need no relief, and others whose necessities can be relieved, if they should be relieved, by other legitimate means.

When we examine the matters to which the Commission, in fixing just, reasonable and equitable divisions, must give "due consideration", it is still more evident that the Commission has no authority to deal with carriers by groups, or by averages of groups. The Commission must give due consideration, among other things, to "the amount of revenue required to pay their *respective* operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation". This is a plain, unequivocal command to consider operating expenses, taxes, and a fair return on the value of the property of *each individual carrier*, in determining the divisions to be enjoyed by it. To hold otherwise is to expunge the word "respective" from the statute.

The obvious purpose of this requirement is to see that each individual carrier receives revenues from divisions, as well as rates, adequate to provide sufficient revenue to pay operating expenses, taxes, and a fair return on its property. This is in obedience to constitutional requirements. It is also in aid of the general policy of the Transportation Act to provide the public with adequate transportation service, and to provide the carriers with adequate revenues to meet their obligations. No authority is conferred upon the Commission to reduce the divisions of a carrier below what is reasonably required for the rendition of proper service. Much less has authority been conferred to reduce the divisions of a carrier already impoverished and earning less than enough to pay its operating expenses, taxes, and a fair return, and to hand it over to other prosperous carriers needing no relief, and even awaiting an action by the Government for the recapture of excess earnings.

Clearly, the Commission, in fixing divisions, is not authorized to give due consideration, or any consideration, to the aggregate operating expenses, taxes, and a fair return on the aggregate value of railway properties of any group of carriers, or the average of any group; nor to fix divisions that might be considered just, reasonable and equitable to a group of carriers, or to the average of the group.

Again, the Commission is required to give due consideration to the "efficiency with which the carriers concerned are operated". This obviously refers to the efficiency of each individual carrier in the conduct of its operations. It is absurd to suppose that it means the efficiency of the group, or the average efficiency of the group, which would be a meaningless expression. So, also, the expression "the importance to the public of the transportation services of such carriers". Manifestly, this refers to each of the carriers individually. No one would be concerned, in prescribing divisions, with the importance to the public of the transportation services of a group, or of the average importance of such group.

Furthermore, the Commission is to consider "whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge". Here, again, it is too plain for argument that each carrier stands on its own bottom and constitutes a separate problem with which the Commission is called upon to deal.

This construction of Section 15 (6) is supported, we confidently contend, by the decisions of this Court, some of which we now refer to.

In *United States* v. *Abilene & S. Ry. Co.*, 265 U. S. 274, which involved the fixing of increased divisions for the Kansas City, Mexico & Orient Railroad Company, one of the objections urged was that the record did not contain any tariffs showing the individual joint rates, or any division sheets showing how these individual joint rates were divided, nor any information concerning the amount of service performed by the Orient and its several connections under such individual joint rates.

In support of the Commission's order it was argued that exhibits were introduced showing the general situation, but this Court held that the order was, nevertheless, void, saying:

> The argument is not sound. The power conferred by Congress on the Commission is that of determining, in respect to each joint rate. what divisions will be just. Evidence of individual rates or divisions, said to be typical of all, affords a basis for a finding as to any one. But averages are apt to be misleading. It cannot be inferred that every existing division of every joint rate is unjust as between particular carriers, because the aggregate result of the movement of the traffic on joint rates appears to be unjust. These aggregate results should properly be taken into consideration by the Commission; but it was not proper to accept them as a substitute for typical evidence as to the individual joint rates and divisions. In the New England Divisions case, tariffs and division sheets were introduced which, in the opinion of the Commission, were typical in character and ample in quantity, to justify the findings made in respect to each division of each rate of every carrier. A like course should have been pursued in the proceeding under review.

In *Brimstone R. & C. Co.* v. *United States,* 276 U. S. 104, this Court again states what the Commission must do in order to make a valid order in a divisions case. In that case, the Commission undertook to fix a new basis of divisions of joint rates to which the Brimstone Railway & Canal Company, the Southern Pacific Company and The Kansas City Southern Railway Company were parties; and it reduced the amount of the divisions which were to be received by the Brimstone Company for the reason that, in the opinion of the Commission, the Brimstone Company was receiving more revenue than was sufficient to cover the cost of its service and a fair return upon the value of its property. The Court in holding the order invalid said:

> The subsequent studies related only to the Brimstone Company; they did not extend at all to connecting carriers. The Commission (88 Interst. Com. R. 63, March 10, 1924) said they were "intended to develop the average cost, including return on investment, of moving loaded cars to and from the Southern Pacific and Kansas City Southern". No studies were made or evidence taken concerning efficiency of Southern Pacific and Kansas City Southern lines, amount of revenue required to pay their respective operating expenses, taxes, and a fair return upon their property, or the public importance of services performed by them, or any other fact or circumstance (except as shown above) which ordinarily, without regard to the mileage haul, would entitle them to a greater or less proportion of the joint rate. Section 15(6). * * *
>
> The Commission evidently undertook to deprive the Brimstone Company of receipts supposed to exceed a fair return on its property and award the same to connecting carriers without evidence tending to show they were in need or had or would re-

ceive more or less than a fair return from agreed divisions, or that the joint rates themselves were unfair and unjust, or that the agreed divisions were "unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers".

Counsel suggest that, in addition to facts revealed by studies of the Brimstone Company's affairs, the Commission did consider existing division sheets of joint rates, volume and distribution of traffic, past division sheets, divisions accorded to the Brimstone Company by the Federal Director General; also testimony showing competition controlled the agreed divisions. But the very definite command of Section 15(6) required more than that.

Both parties rely upon New England Divisions case, 261 U. S. 184, 43 S. Ct. 270, 67 L. Ed. 605, and United States *v.* Abilene & Southern Ry. Co., 265 U. S. 274, 44 S. Ct. 565, 68 L. Ed. 1016.

The first involved an order granting larger divisions to New England roads. We there recognized the necessity of evidence "typical in character, and ample in quantity, to justify the finding made in respect to each division of each rate of every carrier", and declared that with such evidence before it the Commission properly proceeded to consider the importance to the public of the weak carriers and directed divisions intended to effectuate the purpose of Congress to insure adequate transportation service for the whole country, by extending aid to them. Nothing in the opinion supports the view that the Commission may take something from one carrier merely because its net revenue appears unduly large and donate this to another demanding nothing and not in need. Cost of service to one carrier is not the only factor to be considered in determining just divisions.

> In the second case the Commission undertook to modify existing divisions for the benefit of a weak road. It did not appear that any matters consideration of which was required by Section 15(6), Transportation Act 1920, had been ignored, but the evidence concerning some of these things had not been properly presented and therefore the order was annulled.

In the *New England Divisions* case, 261 U. S. 184, the Court said:

> It is asserted that the order is necessarily based upon the theory that, under Section 15 (6), the Commission has authority to fix divisions as between groups of carriers without considering the carriers individually; that Congress did not confer such authority; and that, hence, the order is void. Whether Congress did confer that authority we have no occasion to consider; for it is clear that the Commission did not base its order upon any such theory. The order directs a 15 per cent. increase in the divisions to the several New England lines. It is comprehensive. But it is based upon evidence which the Commission assumed was typical in character, and ample in quantity, to justify the finding made in respect to each division of each rate of every carrier.

In *Assigned Car Cases* (*U. S.* v. *Berwind White Coal Mining Co., et al.*), 274 U. S. 564, this Court again stated the rule which governs in a divisions case, distinguishing it from an assigned car case. The Court said:

> The claim is that the evidence, upon which the finding of the resulting discrimination in these other transportation facilities rests, relates to only a few

carriers, and that the general finding to that effect is without support, because the evidence introduced was not shown to be typical. Compare New England Divisions Case, 261 U. S. 184, 196, 197; United States *v.* Abilene & Southern Ry. Co., 265 U. S. 274, 291. The argument overlooks the difference in character between a general rule prescribed under paragraph (12) and a practice for particular carriers ordered or prohibited under Sections 1, 3 and 15 of the Interstate Commerce Act. In the cases cited, the Commission was determining the relative rights of the several carriers in a joint rate. It was making a partition; and it performed a function quasi-judicial in its nature. In the case at bar, the function exercised by the Commission is wholly legislative. Its authority to legislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general.

Having shown, as we believe, fairly conclusively, that the statute under which the Commission acted does not authorize or permit the use of group conditions, or the average of group conditions, in the determining of just, reasonable and equitable divisions for the several carriers parties to the joint rates, we proceed to point out from the record that this unauthorized method is precisely what the Commission employed in the present case; and to give our reasons for our contention that its action was, therefore, invalid.

(b) The record shows conclusively that the Commission's order is based solely upon a comparison of the average condition of widely dissimilar carriers comprising the Western Trunk Line group with the average condition of widely dissimilar carriers comprising the Southwestern group.

A reading of the report of the Commission (R. 55-93; R. 93-109) shows without question that the Commission's order is based entirely upon a comparison of the average conditions of the two groups of carriers.

We refrain from repeating quotations from the Commission's report contained in the foregoing Statement to the effect that "the vital thing to be considered here is obviously the relative cost of service in the *two groups* (R. 78); that "average freight revenues per ton mile (in the two groups) are better criteria" (R. 78); and that "the cost of service, including a fair return on the investment, are somewhere in the neighborhood of 20 per cent. greater in the Southwest than in the Western Trunk Line group" (R. 83).

The Commission frankly admits that it dealt with the divisions in issue on a group basis, and that no question was raised with respect to the divisions of individual carriers. In its original report (148 I. C. C. 478; R. 86), the Commission said:

> The divisions here in issue are dealt with of record on a group basis. They are in other words the divisions in the aggregate north and south of the gateways named, and no question is raised with respect to the divisions of individual carriers.

In its report upon reconsideration (156 I. C. C. 99, R. 99), the Commission said:

> The proceeding has to do with the divisions in the aggregate north and south of the gateways between the two groups of carriers. It is impracticable to deal with such aggregate divisions except upon the basis of average conditions and the case was so tried by both groups. No carrier sought special treatment for itself nor was any effort made to show that special divisional bases are required by the transportation conditions surrounding particular kinds of traffic.

We respectfully but emphatically challenge the implications contained in the foregoing statement that "the case was so tried by both groups" and that "no carrier sought special treatment for itself". This will be dealt with later, under a separate heading.

The Commission did not in any manner discuss the amounts needed by the individual carriers in order to provide a reasonable rate of return, although a table printed in its report (R. 84), showed clearly the wide dissimilarity in the rates of return received by the individual carriers. Nor did the Commission discuss the effect which its order would have upon the revenues of the various individual carriers. The table referred to, which is taken from the Commission's report (R. 84), states the rates of return based upon their respective investment amounts, of various Western Trunk Line and Southwestern respondents during the years 1922 to 1925, inclusive, and is set out at pages 15-16 of the foregoing statement.

(c) The Commission's order in question, if enforced, will bring about results so illogical, unjust and arbitrary as to be beyond the Commission's power and authority.

As will be seen from the tables above referred to, certain Southwestern carriers, for example, the Kansas City, Mexico and Orient, which had a deficit, or substantially a deficit, in every one of the years shown, and whose financial condition had been so precarious that the Southwestern carriers connecting directly with it had been ordered by the Commission to aid it by paying divisions in excess of the regular divisions (*Kansas City, Mexico & Orient Divisions*, 96 I. C. C. 378), the St. Louis Southwestern Railway Company of Texas, the Kansas, Oklahoma & Gulf Railway Company, and the Louisiana Railway & Navigation Company, all of which were operating at a deficit, or at so small a margin as to be practically a deficit, were ordered to pay increased divisions to such prosperous Western Trunk Line respondents as the Chicago, Burlington & Quincy Railroad Company, one of the strongest roads of the country, which, as shown by the report (R. 84), was enjoying a return of 4.29 to 4.80 per cent., the Illinois Central Railroad Company, also one of the strong lines of the country, which had a return of 4.76 to 5.92 per cent., and the Chicago and Northwestern Railway Company, also a strong line, which had a return from 3.04 to 4.14 per cent. The amounts which are ordered to be transferred from Southwestern respondents to more prosperous Western Trunk Line respondents are substantial.

For example, the Louisiana Railway & Navigation Company, one of the appellants herein, which, as just stated, had deficits in the years 1923, 1924 and 1925, would, under

the Commission's order, be required to pay to the Western Trunk Lines increased divisions amounting approximately to $55.83 per month or $670 per year (R. 1234). The Missouri-Kansas-Texas Railroad, as shown by the tables above referred to, earned an average annual return, for the years 1922 to 1925, inclusive, of 4.44 per cent., and the Missouri-Kansas-Texas of Texas, of 2.87 per cent., and yet, under the Commission's order, the Missouri-Kansas-Texas Lines would be required to pay increased divisions to the following more prosperous Western Trunk Line respondents (R. 1232): about $2,352 per month to the Illinois Central Railroad Company, whose average annual rate of return during the years 1922 to 1925, as shown by the Commission's report, was 5.15 per cent.; about $5,204 per month to the Chicago, Burlington & Quincy Railroad Company, whose average annual rate of return for the said years was 4.55 per cent. per annum; and about $1,790 per month to the Atchison, Topeka & Santa Fe Railway Company, which was content with its old divisions and opposed any change therein, and whose average annual rate of return for the said years was 4.89 per cent. per annum. The Kansas City Southern Railway Company, whose average rate of return for the said years was 2.95 per cent. per annum, would contribute (R. 1230) the following sums: to the Chicago, Burlington & Quincy Railroad Company, whose average rate of return for those years, as already stated, was 4.55 per cent. per annum, $1,610 per month; to the Chicago, Rock Island & Pacific Railway Company, whose average rate of return during those years was 3.80 per cent., the sum of $3,055 per month, and to the Wabash Railway Company, whose average return was 3.57 per cent., the sum of $3,863 per month. Many similar examples will be apparent from a study of the tables.

It thus appears that, after deciding that the vital thing to be determined was the amount needed by the carriers to pay expenses, taxes and a fair return on investment, the Commission made an order which would take revenue from all Southwestern respondents and transfer it to all Western Trunk Line respondents upon the basis of average conditions in the two groups, entirely regardless of the financial conditions of the individual carriers; thus in many instances making the poor poorer and the rich richer.

(d) Appellants are not estopped to contend that the Commission failed to obey the command of the statute, and exceeded its statutory authority in basing its order on average group conditions, instead of upon the condition of each carrier, considered separately.

1. Our first contention, which is one of law, is that if the Commission, as we have contended, failed to obey the command of the statute, or exceeded its statutory power in adjusting divisions between two groups of carriers on the basis of the average condition of the groups, such failure or absence of authority cannot be cured by any action of the parties or by the attitude which they assumed during the hearing before the Commission. The Commission has no power except such as has been specifically given it by Act of Congress; and this power must be exercised as given and cannot be added to or affected in any way by the manner in which the case is presented by the parties. The matter is jurisdictional, and the Commission's jurisdiction cannot be broadened by any act of the parties or by the consent of the parties, even if such consent had been given. It is unnecessary to refer to the many decisions of this and other courts holding that questions of jurisdiction remain

unaffected by the acts and conduct of the parties. This proposition of law should be sufficient to dispose of the claim in the Commission's second opinion and in the opinion of the lower court that the proceeding was conducted before the Commission as a group proposition, and that, therefore, in some way, some estoppel has been created against the appellants.

2. Both the Commission and the lower court were in error in stating that the case was conducted before the Commission as a group proposition, and we now desire to point out this error, even though, unfortunately, it involves a partial examination of this voluminous record.

In the Commission's second opinion, it erroneously stated that the case was tried as a group proposition. It says (R. 99):

> The proceeding has to do with the divisions in the aggregate north and south of the gateways between the two groups of carriers. It is impracticable to deal with such aggregate divisions except upon the basis of average conditions, and the case was so tried by both groups. No carrier sought special treatment for itself, nor was any effort made to show that special divisional bases are required by the transportation conditions surrounding particular kinds of traffic.

And again (p. 96):

> The findings were based chiefly on the relative transportation conditions in the two territories.

Evidently the statement that the case was tried by both groups upon the basis of average conditions was inadvertently made, since it is at variance with the record, as will be clearly shown.

The lower court evidently adopted at its face value the foregoing statement in the Commission's second opinion, for it says (36 F. (2d) 795):

> It appears from the record that the hearings were conducted on the basis of a group proposition. No attempt was made to have the individual carriers treated separately. All witnesses purported to represent all of the southwest carrier respondents.

This statement, we respectfully submit, is wholly at variance with the record, as will plainly appear.

This proceeding, as above stated, was instituted by the Commission on its own motion. There were never at any time any pleadings or issues, nor were there any definite claims made by the Western Trunk Lines during the period while testimony was being taken. Counsel for the Western Trunk Lines frankly stated in the course of the argument upon final submission that during the period when testimony was being taken he could not announce what he wanted because he did not know (R. 1255), and that he could not state his position until the evidence had been put in (R. 1256). At the conclusion of the testimony and during the final argument before the Commission, counsel for the Western Trunk Lines for the first time formulated his demand, as follows (R. 1254):

> What I am interested in is to get such a change in the divisions as will transfer from the southern (southwestern) to the western lines some of the money that the southwestern is getting under the present divisions.

The extremely informal nature of the proceeding will be readily understood. The Western Trunk Lines put in a mass of data showing their need of revenue, and attempting

to show that the Southwestern carriers were in better financial condition. The Southwestern carriers, in the absence of any specific claims on the part of the Western Trunk Lines, and without knowing what the Commission proposed to do, or what it would be asked to do, could do no more than to present evidence to offset, rebut or explain, as well as they could, the evidence offered by the Western Trunk Lines. It was obviously difficult for them intelligently to meet by evidence the data offered by the Western Trunk Lines in support of a position so vague and obscure that it could not be formulated in words until the evidence was all in. When, as above stated, counsel for the Western Trunk Lines at the argument of the case put forth the specific claim for a change in divisions, counsel speaking for the Southwestern carriers said (R. 1273) that their position was that if any changes in divisions were made, they should leave the revenue of the Southwestern lines as it was, or accord them a little more. He also stated (R. 1273) that if the Commission desired to take into consideration "the financial condition of the carriers", it would have to be in a proceeding of another character, as was done in the *Orient* case.

Not only was there no agreement or understanding that the proceeding should be tried on a group basis, but there was a specific protest against any such action. Mr. C. C. Dana, Assistant Freight Traffic Manager of the Santa Fe, declared that it would be "wholly impracticable and would result in grave injustice" to deal with divisions by groups, instead of a determination of just and reasonable divisions *per se*. He said (R. 902):

> It may be possible to arrive at some general equation for the purpose of determining whether or no

> the present division of the aggregate revenue on all of the traffic as between the Western Trunk Lines as a whole and the Southwestern Lines as a whole is just and reasonable, but because of the many varying elements which should be taken into consideration in determination of just and reasonable division *per se*, it would be wholly impracticable and would result in grave injustice to apply such general equation to the divisions from or to any particular territory. The factors which originally fixed the divisions for Arkansas, Oklahoma, Louisiana and Texas were not the same nor are they now, from which it follows: should the Commission decide some change is necessary as to divisions between the various origin and destination territories (they) must be considered on their respective merits.

There is nothing in the first opinion of the Commission even intimating that the parties agreed that the case should be tried as a group proposition, or that a group order should be entered. On the contrary, one of the Commissioners, in his dissenting opinion, protested against dealing with divisions on a group basis, and insisted that each carrier and each joint rate and the division thereof was a separate problem. He said (148 I. C. C. 482):

> No facts are mentioned in the report to justify a finding that the present divisions as applied to individual joint rates, to joint rates on particular commodities or classes of commodities or to particular carriers, are unjust and no such finding is made. Nevertheless, the majority conclude that all existing divisions, considered in the aggregate, are and will be unjust because of the opinion that the aggregate result is unjust. But as said by the Supreme Court, "It can not be inferred that every existing division

> of every joint rate is unjust as between particular carriers, because the aggregate result of the movement of the traffic on joint rates appears to be unjust." U. S. *v.* Abilene & So. Ry. Co., 265 U. S. 274, 291.

Turning, now, to the witnesses who testified before the Commission, it is entirely clear that the lower court was in error in stating that the hearings were conducted on the basis of a group proposition; that no attempt was made to have the individual carriers treated separately; and that all witnesses purported to represent all the Southwest carrier respondents.

Mr. J. E. Hutchinson, Vice-President of the St. Louis-San Francisco Railway, testified (R. 369) concerning financial and operating conditions of that company; about difficult and expensive operating conditions, heavy grades, washouts, light traffic on branch lines, expenditures for improvements to roadbed and equipment in order to promote efficiency and economy; additional expenditures needed for that purpose, but not possible on account of lack of earnings, and that such expenditures could only be undertaken from time to time in the future as earnings permit; increased efficiency and economy through increased freight train loading, decrease in amount of fuel consumed, increase in freight car miles; campaign for safety and claim prevention which has materially reduced payments on account of claims for personal injury and property damage; decrease in operating ratio; that in spite of increased efficiency and economy, the Frisco has never yet earned a fair return on its investment, and that its rate of return on investment now is but slightly greater than it was ten years

ago; that its rates of return on investment are as follows (R. 382):

1916	4.28%
1917	4.35%
1921	4.34%
1922	3.76%
1923	4.24%
1924	4.82%

Other witnesses testified as to the financial and operating conditions existing upon their individual railroads, giving their individual situation and condition.

J. P. Cowley (R. 387, *et seq.*), Assistant to the General Manager of the Gulf, Colorado & Santa Fe Railway, gave similar testimony in reference to the condition of that company. G. W. Lupton, Assistant to Vice-President in charge of operations of the Atchison, Topeka & Santa Fe Railway, testified (R. 404, *et seq.*) in reference to the condition of that company. J. Cannon, General Manager of the Missouri Pacific Railroad, testified (R. 411-419) in reference to that road. W. G. Choate, General Manager of the Gulf Coast Lines, testified (R. 419-430) in reference to that line. L. H. Mathis, Assistant General Freight Agent of the Louisiana Railway & Navigation Company, testified (R. 449-451) in reference to that line. L. H. Cecil, Vice-President and General Manager of the Texas Lines of the Southern Pacific, testified (R. 451-471) in reference to that company. H. E. Earl, General Superintendent of the Texas & Pacific Railroad, testified (R. 471-479) with reference to that company. W. M. Whittenton, Vice-President of the Missouri-Kansas-Texas Railroad, testified (R. 479-490) in reference to that company. E. H. Holden, General Superintendent of Transportation of The Kansas City Southern

Railway Company, testified (R. 490-500) in reference to that company. J. A. Shepherd, Assistant to the General Manager and Superintendent of Car Service of the Kansas City, Mexico & Orient Railroad, testified (R. 443-449) for that company. Mr. Boyd, attorney for that railroad, before having Mr. Shepherd testify, stated (R. 437, *et seq.*) that the tesitmony showed the extremely bad financial condition of that company; its need for additional revenue, and that the Commission had lately made an order increasing its divisions in the proceeding entitled "Orient Divisions Case", 96 I. C. C. 368. That company contended that it could not stand any reduction in its revenues, and that the decision in the Orient Divisions Case was so recent that there could not have occurred any change in conditions that would justify any change in divisions as to it.

In addition to evidence setting forth the operating and financial conditions peculiar to each road, there were certain facts that could be dealt with generally, and in order to avoid unnecessary duplication, the Southwestern respondents divided among several witnesses the task of introducing evidence of that nature. F. S. Schwimm, Assistant Chief Engineer of the Gulf Coast Lines, testified (R. 430-436) that the relative costs of maintenance in the Southwestern region were higher than in the Northwestern and Central Western regions; the latter railroads being, on the average, 15 or 20 years older, more seasoned, and able to be operated more economically. S. H. Bone, Assistant Auditor of Freight Receipts for the Missouri Pacific Railroad Company, introduced and testified (R. 500) regarding an exhibit made from data furnished by the various Southwestern railroads and consolidated by him, showing for the month of October, 1924, the freight traffic

moving from each Southwestern State to Western Trunk Line territory. H. W. Press, Assistant Comptroller of the St. Louis-San Francisco Railway, testified (R. 511-538; 1165-1169) concerning the average net railway operating income, investment in road and equipment, rate of return, net railway operating income per mile of road, capital stock outstanding, dividends declared, per cent. of dividends to capital stock, freight and passenger operating ratios, and other data, concerning each Southwestern respondent and each Western Trunk Line respondent, for the years 1916, 1917 and 1921 to 1925. This testimony covered in more complete form the data which had been introduced by B. F. Parsons on behalf of the Western Trunk Lines, being Exhibit A-38 (R. 222), Exhibit A-50 (R. 250), Exhibit A-51 (R. 258), etc.

One other topic was the subject of general testimony, and that was the existing divisions of the through rates on various classes and commodities in effect between the Southwestern carriers and Western Trunk Lines. There were a vast number of these divisions, and the work of putting them in evidence was divided among a number of witnesses, each of whom testified concerning the divisions on the particular class or commodity assigned to him; and also, in many instances, gave evidence in respect to their own individual lines.

From the foregoing brief résumé of the character of the evidence introduced, it must be apparent that the Commission's statement that the case was tried by all parties on the basis of average conditions, is entirely erroneous; and it is even more apparent that the statement of the lower court, above referred to, was equally erroneous.

The Commission's statement, that the case was tried by both groups on the basis of average conditions, cannot be regarded as a "finding of fact" under the statute. It was more in the nature of an argument to justify it in dealing with groups instead of by a consideration of individual carriers. Indeed, it is quite apparent that Mr. Commissioner Eastman, who wrote both opinions for the Commission, did not at the time of the argument of the case regard the proceeding as a group proceeding, in which only a group order could be entered, for during the argument he made the following statement from the bench (R. 1278):

> Commissioner Eastman: There is nothing in the issues that would prevent us from finding, if the record so shows, that certain divisions are right and that certain divisions are wrong and ought to be corrected.

3. It would be most unjust to the Southwestern respondents to enforce against them, by application of any rule of estoppel, divisions of through rates based upon average group conditions.

Only a portion of the Southwestern carriers were made parties to the proceeding. This omission of the other carriers, who would ordinarily be indispensable parties, is justified in the *New England Divisions* case and the *Orient Divisions* case by the supposed ability of the Southwestern respondents later to pass on the reduced divisions to the other Southwestern carriers. But for this rule all carriers would be required to be made parties.

But these other Southwestern carriers, not made parties to this proceeding, cannot be affected by any principle of estoppel. If it should be sought later to pass the reduced divisions on to them, they would not be bound by any prin-

ciple of estoppel that might be enforced against the Southwestern respondents in this case, but would have the clear right to have their own divisions established by a consideration of their own individual cases under the law. As to them there would have to be an entirely new proceeding, conducted as the statute provides, in which neither average group conditions nor rules of estoppel would control or be binding. The effect, therefore, of applying any rule of estoppel to the Southwestern respondents may be to enforce against them divisions based on average group conditions which they would be wholly unable to pass on to other carriers in the territory, and hence an unequal, unjust and arbitrary result would follow.

(e) As the Commission failed to follow the requirement of the statute, and exceeded its statutory power in basing its decision upon group or average conditions, its order is invalid and should be set aside.

That the Commission exceeded its statutory authority in making the orders complained of has, we feel, been demonstrated by what has been said above. If this be true, then it necessarily follows that the orders cannot stand, and must be set aside. Where the Commission exceeds its statutory power, its action is void (*Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433).

Where the Commission fails to follow the command of the statute, as it did in refusing to consider the carriers individually, instead of by the average conditions of the groups, its resulting order is void (*St. Louis & O'Fallon R. Co.* v. *United States*, 279 U. S. 461).

II.

The Commission's order, if enforced, will operate to confiscate the property of the appellants, and to take their properties without due process of law.

The Commission, in fixing the just, reasonable and equitable divisions of the several carriers who are parties to a joint rate, is required to give "due consideration * * * to their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation". This, we contend, imposes upon the Commission the obligation to fix divisions that are justly compensatory for the service which they cover; and we also contend that the duty also rests upon the Commission, before issuing any divisional order, to make a finding, based on evidence, that the new divisions are sufficient to yield a fair return on the property held for and used in the service of transportation. The language quoted above implies this obligation, since due consideration of a fair return, that is, a constitutional return, cannot be had except by ascertaining and comparing the value of the property employed in the service, with the amount of net revenue resulting from a performance of the service, and reaching and stating its conclusion thereon. It cannot be supposed that the law permits the Commission to give a perfunctory consideration to operating expenses, taxes, and a fair return upon railway property, and then to ignore and disregard that requirement.

It is stated in *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456, 477, and in *United States* v. *Abilene & Southern R. Co.*, 265 U. S. 285, that divisions established

by the Commission must be "adequate to avoid a confiscatory result". This necessarily follows from the plain terms of the Fifth Amendment. It is clear, therefore, that divisions which are confiscatory are void. We contend that the divisions fixed by the Commission's orders in controversy are confiscatory, and that the order is therefore invalid. We also contend, as above stated, that the Commission's order establishing divisions in the light of the requirement of the statute, should contain an affirmative finding, supported by evidence, that the divisions so established are compensatory. There is no such finding in the present record. But whether such a finding is required or not, the Commission's report affirmatively shows that, with two or three possible exceptions hereafter pointed out, none of the carriers against which the order is made was earning a fair return upon the value of its property, as guaranteed by the Constitution, and that the effect of the orders is still further to reduce the revenues of such carriers, and to still further confiscate their properties.

This Court, in *United Railways* v. *West*, 280 U. S. 234, had occasion to consider and decide what constitutes just compensation for a common carrier requiring for efficient public service skillful and prudent management, as well as the use of the plant. It there said (p. 251):

> Sound business management requires that after paying all expenses of operation, setting aside the necessary sums for depreciation, payment of interest and reasonable dividends, there should still remain something to be passed to surplus account; and a rate of return which does not admit of that being done is not sufficient to assure confidence in the financial soundness of the utility to maintain its credit and enable it to raise money necessary for the proper discharge of its public duties.

And the Court, after intimating that a rate of 7½ or even 8 per cent. on the value of the property might be necessary to avoid confiscation, referred to the fact that the company itself had sought from the State Commission a rate that would produce about 7.44 per cent., adding (p. 252):

> Upon the present record, we are of opinion that to enforce rates producing less than this (7.44) would be confiscatory and in violation of the due process clause of the Fourteenth Amendment.

The Commission (148 I. C. C. 476) sets out the rates of return enjoyed by certain respondents for the years 1922 to 1925, inclusive. We reproduce the statement so far as it affects the Southwestern lines, as follows (R. 84):

	1922 *Per Cent*	*1923* *Per Cent*	*1924* *Per Cent*	*1925* *Per Cent*
Southwestern Lines:				
A. T. & S. F.	4.61	5.17	4.63	5.16
C. G. & S. F.	6.05	5.67	9.04	7.55
H. & T. C.	4.30	4.44	5.28	4.33
H. E. & W. T.	2.26	1.75	1.91	7.21
I.-G. N.	2.87	4.98	5.63	4.52
K. C. M. & O.	Deficit	.22	Deficit	.24
K. C. M. & O. of Tex.	Deficit	Deficit	2.41	.47
K. C. S.	2.88	2.60	2.85	3.49
M.-K.-T.	4.72	3.78	4.29	4.96
M.-K.-T. of Tex.	1.63	1.56	5.03	3.28
Mo. Pac.	2.09	2.21	3.81	4.14
St. L.-S. F.	3.99	4.72	5.05	5.23
St. L. S. W.	7.05	7.44	4.97	4.81
St. L. S. W. of Tex.	Deficit	Deficit	1.33	1.46
Texas & Pacific	2.72	3.84	4.15	4.11

It will be seen that one carrier for two years of the period enjoyed a return in excess of 7½ per cent., although its average for the four years is 7.08 per cent. Each and all of the other 14 carriers received a return in each of the four years of less than 7½ per cent.; and many of them

much less—some operating for some of the years at a deficit.

The Commission's statement, above-quoted, did not, however, give the rates of return of all the Southwestern respondents for the years 1922 to 1925, inclusive. Similar data with regard to other Southwestern respondents is contained in Exhibit A-124 (R. 512), as follows:

	Rate of Return			
	1922 Per Cent	*1923* Per Cent	*1924* Per Cent	*1925* Per Cent
Southwestern Respondents:				
Gulf Coast Lines	6.85	8.52	9.68	9.79
The Beaumont, Sour Lake & West. Ry. Co.				
New Orleans, Tex. & Mexico Ry. Co.				
St. Louis, Brownsville & Mex. Ry. Co.				
Ft. Worth & Denver City Ry. Co.	7.40	8.63	10.52	9.19
So. Pacific Lines in Texas and Louisiana	2.35	2.43	3.97	3.27
Galveston, Harrisburg & S. A. Ry. Co.				
Houston & Shreveport R. R. Co.				
Louisiana Western R. R. Co.				
Morgan's La. & Tex. R. R. & S. S. Co.				
Texas & New Orleans R. R. Co.				
*Houston & Tex. Central R. R. Co.				
*Houston East & West Tex. R. R. Co.				
Kansas, Okla. & Gulf Ry. Co.	2.80	1.31	.17	†.08
Louisiana Ry. & Navigation Co.	.39	‡.64	‡1.14	‡1.05
San Antonio & Aransas Pass Ry. Co.	.95	3.12	2.71	§
Vicksburg, Shreveport & Pacific Ry. Co.	3.39	6.16	4.00	5.01

* The rates of return of the Houston & Texas Central R. R. Co. and Houston East & West Texas R. R. Co. were shown in the Commission's table, but the rates of return for the other respondents which form parts of the Southern Pacific System were excluded.

† Indicates deficit.

‡ Indicates deficit. Includes Louisiana Ry. & Navigation Co. of Tex.

§ Included as part of Southern Pacific Lines in 1925.

It will be apparent from an inspection of this additional statement that only two of the lines—Gulf Coast Lines and Fort Worth & Denver City Railway Company—can be said to have enjoyed a fair return. The other five lines received

much less than a constitutional return, three of them operating at a deficit, or substantially so.

The Commission also gives the average return of the Southwestern carriers for several years (R. 84); and this table is reproduced so far as it affects those lines:

Period	*Including Santa Fe and Rock Island Per Cent*	*Excluding Santa Fe and Rock Island Per Cent*
Year 1916	4.82	4.03
Year 1917	5.19	4.92
Year 1921	3.98	3.25
Year 1922	3.51	3.12
Year 1923	3.87	3.53
Year 1924	4.36	4.44
Year 1925	4.55	4.43
Average	4.30	3.95

It will be noted that the average return of the Southwestern lines, including the Santa Fe and Rock Island, was 4.30 per cent; and that the average return of the Southwestern lines, excluding the Santa Fe and Rock Island, was 3.95 per cent.

Measured by the rule of the *United Railways* case, *supra*, none of the Southwestern lines, with the possible exception of the two or three above referred to, earned just compensation for its property. The returns of the eighteen others fell below, and in many instances far below, what this Court has held to be just compensation.

The Commission makes a further computation (148 I. C. C. 474), showing that the Southwestern lines in the year 1924, which it takes as a typical year, did not even earn the 5.75 per cent. return contemplated by Section 15a of the Interstate Commerce Act. This computation is here reproduced so far as it affects the Southwestern lines (R. 80):

	Including Santa Fe and Rock Island	*Excluding Santa Fe and Rock Island*
Book investment	$3,480,105,170	$2,186,939,915
Net railway operating income	151,580,221	97,040,532
Per cent on investment	4.36	4.44
5.75 per cent return	200,106,047	125,749,045
Deficiency	48,525,826	28,708,513

The percentage earned on the investment of the Southwestern lines for the year 1924 was 4.36, including the Santa Fe and Rock Island, and 4.44, excluding the Santa Fe and Rock Island. This also is far below the just compensation to which the carriers were entitled. It is to be borne in mind that the percentage of 5.75 used by the Commission in its computation is not the measure of just compensation to which carriers are entitled. It is merely a factor required by the statute to be applied to group values to produce a sum of net revenue which the rates made by the Commission are expected to yield. But the Commission's own figures in the above computation affirmatively show that the Southwestern lines in 1924 failed by from $28,000,000 to $48,000,000 to earn a 5.75 per cent. return.

It is true that the foregoing rates of return are computed on the recorded investment of each of the companies. The Commission accepted this recorded investment as the best evidence of value of the properties, just as it accepted the recorded investment of railway properties as their value (*Ex Parte* 74, 58 I. C. C. 220, 228), after deducting approximately 5.7 per cent., which may have been intended to represent depreciation. The recorded investments of the carriers have, since 1907, been under the supervision and jurisdiction of the Commission, and investment accounts have been kept as the Commission has required. They may be proven to be somewhat greater or somewhat less than the actual values of railway properties when such values shall

have been ascertained under approved rules and principles. As the recorded investments reflect costs as they were incurred, and as such costs are now on a higher basis, it is probable that the application of the rule in the *O'Fallon* case (279 U. S. 461) would indicate a higher value than the book value. Quite likely, the recorded investment is the nearest approximation to real value available at the present time.

It may with propriety be said in this case, as this Court said in the *Minnesota Rate* cases, 230 U. S. 324, 472, in speaking of the value of the Minneapolis & St. Louis Railroad Company and referring to the book cost of its property, its reproduction cost, etc.:

> The margin of error which may be imputed to them is not sufficiently great to change the result.

There the rates of return were 4.14, 3.5 and 3.7 per cent., respectively, for the years 1907, 1908 and 1909. This Court did not hesitate to conclude that the rates there in question, which operated to reduced these rates of return, were confiscatory, since they made "a very serious reduction in a return already inadequate".

A similar situation is presented in *Norfolk Ry. Co.* vs. *Conley*, 236 U. S. 605, 614.

If the recorded investment in railway property is not to be accepted as value in this case, then it must necessarily result that the Commission had no evidence of value before it, and it could not, and did not, therefore, give consideration to "a fair return upon the railway property held for and used in the service of transportation". This would amount to a failure on the part of the Commission to comply with the mandate of the statute, and its resulting order would be void under the rule in the *O'Fallon* case, *supra*.

It is respectfully submitted that the Commission's own figures affirmatively establish that at the time it made the orders here in question the Southwestern carriers, with possibly two or three exceptions, were not receiving the just compensation for their properties that they were entitled to. The returns were plainly inadequate, and yet the Commission, with this fact before it, deliberately still further reduced their already inadequate returns in the aggregate amount of $3,000,000 annually. We contend that the Commission had no authority, legally or morally, to bring about a result so arbitrary, unjust, inequitable, and so violative of constitutional guaranties.

No doubt the Commission felt, and properly felt, that the Western Trunk Line carriers needed increased revenue in order properly to serve the public. Many other carriers in the country, perhaps all of them, feel that they, too, should have their revenues increased. While it was entirely within the power of the Commission, and perhaps its duty, as well, to afford relief to the Western Trunk Lines, it was not authorized to balance the unhappy condition of the carriers in the two groups, and to decide that the situation of one group was more desperate than that of the other, and to grant relief to one by further reducing the already inadequate revenues of the other.

The revenues of the Western Trunk Lines, of which but 2½ per cent. is derived from the joint rates under consideration in this proceeding (R. 520), could have been increased in a proper and approved manner without inflicting injury on the Southwestern carriers. They could have applied for an increase of both state and interstate rates. It is to be assumed that if their case was a meritorious one, relief would have been afforded to them.

Furthermore, the way was open to the Commission, if it so desired, to increase the joint rates in question, which would have afforded some relief to the Western Trunk Lines, and also to the Southwestern lines. Or if the Commission was unwilling to grant any relief to the Southwestern carriers, notwithstanding the inadequate rate of return enjoyed by them, it could, if it had so desired, have increased the joint rates and provided that the increase in the joint rates should be added to the divisions of the Western Trunk Line carriers, thus giving the Western Trunk Lines the entire benefit of the increase, and leaving the Southwestern carriers precisely where they were. The density of traffic in the Western Trunk Line territory was found by the Commission (148 I. C. C. 471) to be over 50 per cent. greater than the traffic density of the Southwestern carriers. Only a small increase in joint rates would have been required, therefore, to give to the Western Trunk Lines, by reason of their greater density of traffic, any relief to which the Commission might have considered them entitled. But the Commission adopted neither of these alternatives. The result of its action, we contend, is to take the property of the Southwestern carriers without just compensation, and hence its order is invalid.

III.

The Commission's order with relation to the division of joint rates on traffic to and from points east of the Illinois-Indiana State line is unlawful because the Commission did not have the Eastern carriers operating east of said State line before it: nor did it have any evidence that the divisions of the joint rate received by such Eastern carriers were just, reasonable and equitable, or otherwise.

The Commission's order prescribed the divisions of the through rate accruing to Western Trunk Line carriers on traffic having origin or destination in Southwestern territory and in Eastern territory; that is, territory east of the Illinois-Indiana state line. This class of traffic had neither origin nor destination on the Western Trunk Lines; the latter acting only as intermediate carriers. There are 19 carriers (R. 1293) in Eastern territory having direct connection with the Western Trunk Lines at points east of the Mississippi River. These 19 lines we will speak of, for convenience, as the "Eastern carriers". It results, therefore, that on the traffic in question, where the Western Trunk Lines acted as intermediate carriers, the parties to the joint rates are the Southwestern lines, the Western Trunk Lines and the Eastern carriers. Each of these three groups is a partner, so to speak, in the joint rates and the revenue accruing therefrom. This traffic is substantial. In the June test it was 36.7 per cent.; in the October test, 13.5 per cent. (148 I. C. C. 462).

As a preliminary matter, it should be explained that the Southwestern lines have never had any relations with the

Western Trunk Lines on the class of traffic now under consideration (R. 1290-1292). The primary point of interchange between the Southwestern carriers and the Eastern carriers was East St. Louis. Divisions on this class of traffic were agreed upon between the Southwestern lines and the Eastern carriers. The Western Trunk Lines were not a party to these divisional agreements, and had no relation to them. Then it was agreed between the Southwestern lines and the Eastern carriers that the same divisions applicable east and west of East St. Louis, that is, between the Southwestern carriers and the Eastern carriers, should apply to the Mississippi River crossings north of East St. Louis, such as East Hannibal, East Dubuque, Rock Island, Savanna and East Burlington. The rails of the Eastern carriers do not reach the Mississippi River at these north crossings, and therefore they are compelled to arrange with the Western Trunk Lines to move the traffic between junctions at Chicago and interior Illinois points and the Mississippi River crossings; and the Western Trunk Lines and Eastern carriers have arrangements under which, for the service thus performed by the Western Trunk Lines, the latter receive a part of the division accruing to the Eastern carriers under their agreement with the Southwestern carriers. In short, the divisional agreements on all of this class of traffic are solely between the Eastern carriers and the Southwestern carriers. The Eastern carriers, in a sense, employ the Western Trunk Lines to move the traffic between their lines and the Mississippi River, for which service the Eastern carriers pay the Western Trunk Lines on some agreed basis. This is all made clear in Mr. Leland's testimony (R. 1290-1292).

The effect of the Commission's order as to this class of traffic was to require the Southwestern carriers to contrib-

ute certain amounts from their own revenues to increase the compensation which the Western Trunk Lines were receiving from the Eastern carriers. The Commission did not stop to inquire whether the Eastern lines themselves should increase the compensation they were paying to the Western Trunk Lines. The Eastern lines were not made parties to the proceeding and there was no investigation as to their financial or operating conditions. For aught that appears in the record, the Eastern carriers were realizing unduly high divisions, even after paying the Western Trunk Lines for the transportation service performed by them, and in that event it was manifestly unjust and inequitable to place upon the Southwestern carriers the entire burden of affording relief to the Western Trunk Lines.

We contend that the Commission disobeyed the statute, and was without authority to prescribe divisions of the joint rates here in question without making the Eastern carriers parties to the hearing, and taking testimony and reaching a conclusion as to what their just, reasonable and equitable divisions of the through rates should be.

Section 15 (6) of the Interstate Commerce Act, which prescribes and limits the Commission's authority, provides that when it is of opinion that the divisions of joint rates, fares and charges are or will be unjust, unreasonable and inequitable, or unduly preferential or prejudicial "as between the carriers parties thereto", then the Commission shall by order prescribe the just, reasonable and equitable division thereof "to be received by the several carriers". In prescribing and determining the divisions, the Commission shall give due consideration to the efficiency with which "the carriers" are operated, the amount of revenue required to pay their respective operating expenses,

taxes, and a fair return on their railway property held for and used in the service of transportation, etc.

The divisions of the joint rates, fares and charges must be shown to be unjust, unreasonable, etc., "as between the carriers parties thereto," before the Commission is authorized to exert its authority to correct the inequality. What does the statute mean by the expression "the carriers parties thereto" except the parties to the joint rates under investigation? They are partners in the joint rates, but the partnership interest of each is not dependent upon any fixed arrangement, such as a mileage prorate, or fixed percentage, but is determined exclusively by the Commission, in the exercise of its *quasi*-judicial functions, after giving due consideration to the matters prescribed in Section 15 (6) as such matters may affect each and all of the carriers parties thereto. It is settled that one carrier "may be given a division larger than justice merely as between the parties would suggest 'in order to maintain it in effective operation as part of an adequate transportation system'" (*United States* v. *Abilene & Southern R. Co.*, 265 U. S. 285). The relationship between the parties to a joint rate, and their relative rights to a share thereof, cannot be determined until the Commission has performed its duties as to all parties. It is plain, therefore, that a joint rate to which three carriers are parties cannot be apportioned to one or to two without a consideration of the third. In this case no one can intelligently determine the rights and duties of the Western Trunk Line carriers and the Southwestern carriers without at the same time giving consideration to the rights and duties of the Eastern carriers. Each of the three carriers is to be considered; its efficiency, the amount required by it to pay operating expenses, taxes, and a fair return on its property, etc.

The Commission ignored the Eastern carriers. They might have been receiving excessive divisions, or divisions that were unreasonably low; or their divisions may have been just, reasonable and equitable. But the Commission did not stop to inquire. The Western Trunk Lines demanded increased divisions, and the Commission found that their divisions were unreasonably low. It assumed without evidence that if this deficiency was to be made up, it should be made up by the Southwestern carriers. But why might not the deficiency have been made up, in part at least, fairly and justly by the Eastern carriers? It was the Commission's duty to investigate "the several carriers" parties to the joint rates, and to fix divisions to be received "by the several carriers" parties to the joint rates. It was clearly the duty of the Commission to make the Eastern carriers parties, and to investigate their condition, and to adjust their divisions, if they needed adjusting. The action of the Commission in ignoring the Eastern carriers is equivalent to a finding that their divisions were just, reasonable and equitable, and that they should make no contribution to the deficiency of the Western Trunk Lines. Such a finding is wholly without any evidence whatsoever for its support.

The present case is similar to *Brimstone R. Co.* v. *United States*, 276 U. S. 104. There the Commission investigated the divisions received by the Brimstone Company on traffic interchanged on joint rates with the lines of the Southern Pacific and Kansas City Southern. It found that the divisions received by the Brimstone Company were excessive and amounted to an indirect rebate, and ordered their reduction. But it ignored the other carriers, as it has ignored the Eastern carriers here, and made no inves-

tigation of their needs and requirements. The Court said (p. 114):

> No studies were made or evidence taken concerning efficiency of Southern Pacific and Kansas City Southern lines, amount of revenue required to pay their respective operating expenses, taxes, and fair return upon their property, or the public importance of services performed by them, or any other fact or circumstance (except as shown above) which ordinarily, without regard to the mileage haul, would entitle them to a greater or less proportion of the joint rate. Section 15 (6).

The Court concluded that the order was invalid, using the following language (p. 117):

> The record discloses that before making the challenged order the commission failed to consider the items definitely specified by section 15 (6). And it must be annulled.

We contend that the Commission's order herein is invalid, because it did not make the Eastern carriers parties and give due consideration to the various elements specified in Section 15 (6) with respect to the divisions of the joint rates to which all three, the Eastern carriers, the Western Trunk Lines and the Southwestern lines, were parties, all as the statute requires.

IV.

The challenged order is unsupported by any substantial evidence, is contrary to the evidence, inconsistent with itself and therefore void, because the Commission, after finding that the Southwestern respondents require an average of 17 to 20 per cent. greater revenue per ton per mile of freight transported under the joint rates than do the Western Trunk Line respondents, prescribed divisions which yield to the Southwestern respondents not more than 9 per cent. greater revenue, without any finding or evidence to support its action in so doing.

In addition to our contentions that the basis adopted by the Commission was fundamentally erroneous, for the reasons elsewhere stated, we also contend that, upon the basis adopted by the Commission, its order is unsupported by and inconsistent with the evidence and findings, and is inconsistent with itself, and therefore invalid.

As already stated, the Commission, after a general discussion of the levels of rates, population, industrial development, density of traffic, etc., in the Western Trunk Line region and the Southwestern region, stated (R. 78) that "The vital thing to ascertain here is obviously the relative cost of service in the two groups".

The Commission found that, in 1924, it cost about 15 per cent more per ton per mile to transport freight in the Southwest than in Western Trunk Line territory.

The Commission continued (R. 79):

> A still better basis for comparison would obviously be the amounts needed in each case to cover

> operating expenses, taxes and other like charges, and a fair return on investment.

The Commission made a calculation as to the amounts needed, per ton mile of revenue freight, by each so-called group to pay operating expenses, taxes and other like charges and a return of 5¾% upon the aggregate investment of each group, made an adjustment for passenger operations, and found (R. 83) that

> in 1924 the constructive freight revenue per ton mile was 12.01 mills in Western Trunk Line territory and 14.29 mills in the Southwest, an excess for the latter of 18.9 per cent. The effect of these figures is to indicate that the cost of service, including a fair return on investment, was somewhere in the neighborhood of 20 per cent greater in the Southwest than in the Western Trunk Line group, based on averages of 1923 and 1924 operations, and somewhere in the neighborhood of 17 per cent greater based on 1924 operations.

The Commission made no other findings as a basis for dividing the revenues from the joint rates between the Southwestern respondents and the Western Trunk Line respondents. It did state some considerations which in its opinion showed that a finding that the Southwestern respondents were entitled to an average revenue per ton mile 20% greater than the Western Trunk Line respondents was not unfair to the Southwestern respondents.

The Commission made no specific findings with reference to the other matters to which the provisions of paragraph 6 of section 15 of the Interstate Commerce Act require it to give due consideration.

Upon this subject the Commission (R. 85), after quoting the matters to which it is required to give "due consideration", said:

> In reaching our conclusions we have taken all these matters into consideration *to the extent that the record makes it possible to do so.*

This is an indication that the record, in a proceeding carried on by the Commission on its own initiative, was, or may have been insufficient, and that the matters specified in the statute were considered only so far as a deficient record would permit.

The Commission did require the deduction of 15¢ in arriving at the formula for the divisions, in cases where the Western Trunk Lines were intermediate carriers as to traffic to and from Eastern territory. With this exception, however, there were no findings with reference to the other matters specified in paragraph 6 of section 15 of the Interstate Commerce Act. Especially were there no findings as to any of those other matters as a basis for a different division, than would otherwise be proper, of the joint rates of any carrier or carriers.

The Commission summarized what it termed the salient facts in the evidence. We quote them in full for the purpose of showing that they constitute no basis of fact sufficient to support the order. They are as follows:

> 1. That the present divisions were established, for the most part, about 35 years ago and conform to no logical or consistent basis. They are considerably more favorable to complainants in the case of oil and lumber than in the case of other forms of traffic.
>
> 2. That transportation conditions have changed materially since most of the divisions were established,

and that the change has benefited defendants more than it has complainants. The trend is distinctly in favor of defendants.

3. That transportation conditions are nevertheless more favorable in Western Trunk Line territory than in the Southwest, more particularly with reference to density of traffic. However, conditions vary in the different parts of Western Trunk Line territory, and appear on this record to be considerably more favorable in Illinois than in the other states included in that region. They grow continually less favorable from east to west.

4. That the difference in transportation conditions is reflected in the level of rates in the two territories. It is not possible from the record to determine just what the difference is in average levels, but it appears to be greater than the difference in average transportation conditions. This is particularly true of the class rates, which have apparently been constructed upon somewhat different theories in the two territories, and are in process of revision in Western Trunk Line territory.

5. That the cost of operation per ton mile, including all expenses, charges, and a fair return on investment, in all probability does not average as much as 20 per cent higher in the Southwestern than in the Western Trunk Line group.

6. That the financial condition of complainants is not on the whole as good as that of defendants.

The Commission then stated:

> In our opinion the divisions in issue are not just, reasonable and equitable. Many of them are unjust to complainants, and some of them are unjust to defendants. To cure their defects, they must be readjusted upon a consistent basis which will as nearly

as practicable reflect, in the light of all the facts of record, the differing conditions in the two territories. Such a readjustment will, we think, be accomplished if the joint rates are divided, south and north of the gateways, in proportion to assumed rates for the two hauls, the assumed rate for the distance covered by the haul south of the gateway to be the first-class rate for that distance under the present Southwestern scale, and the assumed rate for the distance covered by the haul north of the gateway to be 80 per cent of the first-class rate for that distance under the same scale in the case of traffic to or from points in Illinois and Wisconsin and 87 per cent in the case of traffic to or from other points in the Western Trunk Line group. Where differentials are added in either territory in making the rates, such differentials should be deducted before prorating and added to the divisions of the lines in the region in which they apply. In the case of traffic to or from points in official territory east of the Indiana-Illinois State line, the assumed rate used in determining complainants' proportion of the revenue accruing to the Western lines should be 80 per cent of the first-class rate under the Southwestern scale for the distance covered by complainants' haul minus 10 cents because of the absence of originating or delivering service.

As we shall show under another heading in this brief, neither this Southwestern scale nor the above formula was put in evidence, or in any manner brought to the attention of the Southwestern respondents, so that there was no opportunity to introduce evidence as to the propriety of their use or the division of the revenue which would result. The Southwestern scale was established in the Southwestern territory after the taking of testimony in this proceeding was concluded. This scale does not apply in West-

ern Trunk Line territory, and the level of rates there is much lower than in the Southwestern territory (R. 69-71).

Upon the publication of the Commission's report, the Southwestern respondents made a test of the actual workings of the said formula and found that the basis prescribed by the Commission, instead of yielding to the Southwestern respondents 20% greater revenue per ton mile, would yield to them only about 5.8% greater revenue. They brought this to the attention of the Commission in their petition for rehearing and for leave to introduce additional testimony. The Commission denied the petition, but made some changes in its divisional formula, and ordered that the same should be effective on and after August 1, 1929 (R. 109-113). The Southwestern respondents made a test of this modified formula, and introduced evidence at the hearing of this suit showing that the divisions prescribed by the Commission in said order, instead of yielding to the Southwestern respondents 20% greater revenue per ton mile, will yield to the Southwestern respondents only 9% more revenue per ton mile (R. 1225-1227).[5]

The actual working out of the Commission's formula gives to the Southwestern respondents only 9% greater revenue per ton mile, which is less than either the cost of service or the cost of service plus a return on the investment. We submit that it falls so far below the amount which the Commission found to be necessary, by the cri-

[5] Stated more fully, the Commission found that the amount needed by the Western Trunk Line respondents, in 1924, to pay operating expenses, taxes and a fair return on investment was 12.01 mills per ton mile, and by the Southwestern respondents, 14.29 mills per ton mile, an excess for the latter of 18.9 per cent. The test (R. 1226) showed that under the divisions prescribed by the Commission, the Western Trunk Line respondents would receive 12.93 mills per ton mile, and the Southwestern respondents, 14.10 mills per ton mile, an excess for the latter of only 9 per cent.

terion which it adopted as the basis for prescribing divisions, that the Commission's order is not supported by the findings and is void.

The Commission in its report on reconsideration endeavored to justify its formula, but made no effort to meet the showing of the Southwestern respondents that the formula prescribed by it did not yield 20% more revenue per ton mile. As we understand the report, the Commission, in its second report, devoted its efforts to showing that the formula ought to yield to the Southwestern respondents 20% greater revenue. In fact, the Commission claimed that it ought to yield more than that. The Commission said (R. 104):

> In 1924 these comparisons indicated that transportation costs in the Southwest exceeded those in Western Trunk Line territory by the following per cents.: (a) 14.6, (b) 19.5, (c) 18.9. In 1923 the per cent for (a) was 21.4 and for (b) it was 28.2. We did not have the figures for (c) in 1923. From these figures we drew the general conclusion, which is now criticized, that the cost of service in the Southwest was somewhere in the neighborhood of 20 per cent. greater, based on averages of 1923 and 1924 operations, and somewhere in the neighborhood of 17 per cent. greater, based on 1924 operations. The actual figures which we used in arriving at our divisional basis was about 22.5 per cent., for we used 25 per cent. excess for the Southwest on the traffic to and from Illinois and Wisconsin points and 15 per cent. for the remainder of the traffic to and from Western Trunk Line points, and the former appeared to be about three times the latter in volume. We realized that the statistics were open to criticism in certain respects, and resolved doubts in favor of the carriers whose revenues would be reduced by our findings,

> i. e., the southwestern lines. The final result was not the product of the statistics alone, but was reached in the exercise of judgment after considering all of the pertinent evidence.

The error of the Commission, as we see it, lay in the fact that, in ascertaining the relative amounts of revenue required by the Southwestern respondents and the Western Trunk Line respondents as groups, to pay expenses, taxes and a return on investment, the Commission made its calculations on the basis of the average revenue per ton mile required, which of course assumed an average constant cost of transportation without regard to length of haul or other conditions affecting such cost. The Commission then sought to make this finding effective, not by ordering a division of the revenue on a mileage pro rate constructed by allowing the Western Trunk Line respondents their actual mileage and the Southwestern respondents 1.2 miles for each mile of their actual mileage, but by applying different per cents. at different gateways to an assumed scale of rates, without any accurate adjustment for the relative amounts of traffic passing through the different gateways and without any adjustment (if one were possible) on account of the fact that the rates which the Commission sought to divide are not constructed strictly on the basis of a constant and uniform cost of service and return on investment. It would have been a miracle if the formula which the Commission prescribed had divided the revenue in accordance with the Commission's findings as to the relation of amounts of revenue per ton mile needed to pay expenses and return on investment in the two groups, and the miracle was not performed.

The Commission recognizes that it has not been customary to construct freight rates by increasing such rates in strict proportion to the increase in distance but on the contrary that, as the distance increases, the rate increases less in proportion to the increase in distance. In *United States War Department* v. *Abilene and Southern Railway Company*, 151 I. C. C. 91, the Commission said (p. 103):

> In the first place the rates used in pro-rating were all designed to cover both terminal and line haul service and in the second place most rate scales do not increase in proportion to distance quite apart from this circumstance.
>
> While the Commission without any proof therefor has assumed that the cost of transportation decreases as the length of haul increases it has stated that if this is a fact the relationship has not been determined.

In *Consolidated Southwestern Cases*, 123 I. C. C. 203, 385, the Commission said:

> There is, however, in this record no evidence showing conclusively the relationships which from a cost standpoint the longer haul rates should bear to the shorter haul rates.

In a dissenting opinion, in *Wool Rates Investigation*, 1923, 120 I. C. C. 493, Commissioner Eastman, who wrote the majority opinion in the case at bar, said:

> • • • in this country the freight-rate structure is built to an extent upon the principle of encouraging long-haul traffic without strict regard to differences in cost of service. I think it must be conceded that most of the scales which we construct have a diminishing ton-mile yield as distance increases which is

> out of proportion to the diminishing ton-mile cost. Certainly this is true of practically all of the long-haul rates which the carriers voluntarily establish. Proof can easily be supplied by comparing the divisions of transcontinental rates on important commodities with the local rates for the same hauls. It is thus a principle either consciously or unconsciously recognized that the public interest requires some concession in rates to long-haul traffic.

As already stated, the error in the Commission's action lay in the fact that in determining the cost of service the same was taken as a constant amount for each ton-mile transported and the Commission's finding shows that in order to enjoy the same rate of return as the Western Trunk Lines the Southwestern respondents must receive an average revenue, from each ton-mile, 20% greater than that received by the Western Trunk Lines. When the Commission sought to apply this finding in its formula, however, it could not be done for the reason that the rates do not provide an average constant amount to cover the cost of service nor an average constant amount to provide for an average rate of return, and the result was that the Commission's order, instead of yielding to the Southwestern respondents 20% greater revenue per ton-mile out of the joint rates involved, yielded to them only about 9% greater revenue per ton-mile, with a loss to the Southwestern respondents, *upon the basis of the Commission's finding*, of not less than $109,780 per month, or $1,317,360 per year (R. 32).[6]

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[6] This amount is obtained by increasing by 20% the ton miles of the Southwestern respondents, shown in Ex. 10 E. F. M., R. 1226, and dividing the total revenue, $4,953,349, for September, 1928, in proportion to the actual ton miles of the Western Trunk Line respondents and the ton miles plus 20% of the Southwestern respondents.

The Commission in its report on reconsideration (R. 95) states that it is not certain that the test of September, 1928, is representative. The Commission refused, however, to reopen the proceeding, as prayed by the Southwestern respondents, in order that this and other evidence might be introduced and considered. Appellants' evidence (R. 1228) in the district court shows also that if the computations made by the Commission (R. 95) as to the amounts which would be received by the Western Trunk Line respondents, under its formula, from the revenue shown in the June and October, 1924, tests, are completed, they also support the above contention of appellants.

The Commission refused to grant to the Western Trunk Line respondents a mileage pro-rate, which it estimated would yield them an increase in revenue of between $2,000,000 and $2,500,000 per year, and yet it prescribed a formula which, from only about two-thirds of the traffic (that is, the order applies to only about two-thirds of the traffic between Western Trunk Line territory and Southwestern territory, viz.: $4,953,349 out of $7,007,054 for the month of September, 1929, Petitioner's Exhibit 10, R. 1226) will yield them almost $3,000,000 per year (R. 1226).

There was no investigation and no finding as to whether the formula prescribed in the Commission's order would divide the revenue substantially in accordance with the findings contained in the report. The order was, therefore, unsupported by the evidence and the findings.

In *Interstate Commerce Commission* vs. *Louisville & Nashville Railroad Company*, 227 U. S. 88, this Court said:

> In the comparatively few cases in which such questions have arisen it has been distinctly recog-

> nized that administrative orders, *quasi* judicial in character, are void . . . if the facts found do not, as a matter of law, support the order made (citing many cases).

In *Interstate Commerce Commission* vs. *Chicago, Burlington & Quincy Railroad Company, et al.*, 186 U. S. 320, this Court said:

> Two absolutely conflicting propositions cannot at the same time be adopted. As the finding was that both the terminal charge of $2 and the through rate as reduced, when separately considered, were just and reasonable, and as the further finding was that as a consequence of the reduction of from $10 to $15 per car, the rates, considered together, were just and reasonable, it follows that there can be no possible view of the case by which the conclusion that the rates were unjust and unreasonable can be sustained.

In the *Chicago Junction* case, 264 U. S. 258, 265, this Court said:

> To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action. As it was admitted by the motion that the order was unsupported by evidence, and since such an order is void, there is no occasion to consider the other grounds of invalidity asserted by plaintiffs.

In a similar case, *Chestnut Ridge R. Co.* v. *United States,* 248 Fed. 791, the court, after discussing the respective functions of the Commission and the courts in such cases, held:

> An order of the Interstate Commerce Commission, fixing the divisional share of joint through

> rates to which a railroad company was reasonably and lawfully entitled, by determining the cost of its service and adding thereto a percentage as profit, *held* invalid, as unsupported by the evidence, because of a mistake in the theory upon which it calculated an item of the cost of service.

The evidence before the Commission must be not merely sufficient to support certain of the findings and conclusions of the Commission, but must be sufficient to support all findings and conclusions, and the findings and order of the Commission are not valid if based upon mere speculation, caprice, or arbitrary conclusions.

V.

The Commission exceeded its authority, and the order is void, because it is not in the public interest.

The said order is void because it is contrary to the public interest in taking revenue from weak carriers and transferring it to stronger carriers, thereby producing the opposite effect from that which was intended to be accomplished through the passage of the Transportation Act.

This Court has held that, in fixing divisions, the public interest must be considered.

In the *New England Divisions Case,* 261 U. S. 184, 194, this Court said:

> By new section 15 (6), page 486, the Commission is directed to give due consideration in determining divisions to "the importance to the public of the transportation services of such carriers", just as by Section 15 (3), page 485, the Commission is authorized, upon its own initiative, when "desirable in the

public interest'' to establish joint rates and ''the divisions of such rates''.

This Court adds the following comment in the margin:

> In thus making clear that in fixing divisions as well as rates the public interest should be considered, Congress doubtless had in mind expressions to the contrary in opinions of the Commission.

In the same case this Court said (261 U. S. 189):

> Transportation Act, 1920, introduced into the federal legislation a new railroad policy. Railroad Commission of Wisconsin *v.* Chicago, Burlington & Quincy Railroad Company, 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses, particularly those arising from excessive or discriminatory rates. The 1920 act sought to insure, also, adequate transportation service. * * * The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on *capital devoted to the transportation service.* * * * By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible unless additional revenues were procured. A general rate increase alone would not meet the situation. There was a limit to what the traffic would bear. * * * Moreover, it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines), if thereby prosperous competitors earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and of their widely varying earning power was fully realized. It was necessary to avoid unduly burden-

> some rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. To accomplish this two new devices were adopted: The group system of rate making and the division of joint rates in the public interest. Through the former, weak railroads were to be helped by recapture from prosperous competitors of surplus revenues. Through the latter, the weak were to be helped by preventing needed revenue from passing to prosperous connections. Thus, by marshalling the revenues, partly through capital account, it was planned to distribute the augmented earnings, largely in proportion to the carriers' needs.

In *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 284, this Court said:

> It is settled that, in determining what the divisions should be, the Commission may, in the public interest, take into consideration the financial needs of a weaker road, and that it may be given a division larger than justice merely as between the parties *would suggest* "in order to maintain it in effective operation as part of an adequate transportation system", provided the share left to its connections is "adequate to avoid a confiscatory result". Dayton-Goose Creek Ry. Co. *v.* United States, 263 U. S. 456, 477; New England Divisions Case, 261 U. S. 184, 194, 195.

As we have already shown, the order of the Commission in the present case, instead of preventing needed revenues from passing to prosperous connections, compelled some of the weakest carriers in the Southwestern territory, which are operating at a deficit, or what is substantially a deficit, to pay a part of those needed revenues over to some of the strongest carriers financially in the territory, such as the

Illinois Central Railroad and the Chicago, Burlington & Quincy Railroad. We submit that it is clear, without further argument, that such an order, instead of promoting the public interest, is directly contrary to it, and is entirely repugnant to the purposes of the Transportation Act.

VI.

The decision of the Commission is based upon such incomplete and unreliable evidence and conjectures as to be wholly void.

The computations as to relative conditions of the Southwestern and Western Trunk Line carriers were not based upon even reasonably accurate data or findings.

The Commission said (R. 85):

> The greatest obstacle in securing a satisfactory record has been the difficulty of determining relative costs of service so far as the traffic in question is concerned. It has apparently not been practicable to segregate this traffic for this purpose from the other traffic in the two groups, nor indeed to separate group traffic wholly from operations beyond group boundaries.

As to density of traffic, the Commission said (R. 71):

> The record does not afford any exact measure of the situation.

The Commission also said (R. 78):

> These figures are, of course, *open to criticism* that they are either based upon the operations of systems which extend in some instances beyond group boundaries, or, in the case of the strictly group lines,

> upon an incomplete showing of group operations. However, there are reasons to believe that they are not unfair to defendants. In the first place, while both groups contain systems which extend beyond their western boundaries into territory with less favorable operating conditions, the Western Trunk Line group also contains systems, such as the Wabash and the Illinois Central, which extend beyond its eastern boundary into official territory with its more favorable operating conditions, and in the case of the Illinois Central, into the Mississippi Valley portion of Southern territory.

There was no evidence to support the above conjectures of the Commission that the various opposing influences described above would counteract each other in proper proportion and lead to a substantially accurate result, so that they not only indulged in conjecture, but in conjecture unsupported by any evidence.

The Commission's conclusions are of like kind (R. 86):

> That the difference in transportation conditions is reflected in the level of rates in the two territories. It is not possible from the record to determine just what the difference is in average levels, but it appears to be greater than the difference in average transportation conditions. This is particularly true of the class rates, which have apparently been constructed upon somewhat different theories in the two territories, and are in process of revision in Western Trunk Line territory.

The Commission then made one further conjecture, that a formula which had never been submitted to petitioners for testing or criticism and which made use of certain per cents of a rate scale which bore no definite and constant relation to the joint rates in controversy nor to cost of

operation, would, by some magic, yield to the Southwestern carriers 20 per cent more revenue per ton per mile than to the Western Trunk Line carriers.

The burden of proof was upon complainants, and if the evidence was insufficient to make a substantially accurate decision, as was the situation here, the Commission should have dismissed the proceeding, as the examiner recommended be done, instead of resolving all doubts against the defendants, as was the effect of its decision.

This was an adversary proceeding, and the burden of proof was upon the Western Trunk Line complainants. As this Court said in *United States* v. *Abilene & Southern R. Co.*, 265 U. S. 274:

> Every proceeding is adversary, in substance, if it may result in an order in favor of one carrier as against another.

It clearly appeared from the evidence that while the Southwestern Lines were receiving a larger relative share of the revenues from the joint rates, length of haul considered, this was justified because (1) transportation costs due to less density of traffic and other causes are materially higher per ton per mile in the Southwestern territory, and (2) the level of rates in the Southwestern territory is much higher than in the Western Trunk Line territory. The Southwestern territory is, as a result, paying the higher cost of operating the Southwestern railroads. There would be no justification, of course, for taking revenue paid by the shippers in the Southwestern territory on account of the higher cost of operating their railroads and transferring it to the Western Trunk Lines if the Southwestern carriers are receiving only that share of the revenue under the joint rates which is in proportion to the higher costs

of operation and the higher level of rates in the Southwest.

It is obvious that the financial distress, if any, of the Western Trunk Lines is largely due to the failure to maintain a sufficiently high level of rates in that territory. The Western Trunk Lines have made application in *Ex Parte 87 (Sub. No. 1), Class Rates Within Western Trunk Line Territory,* for substantial increases in rates (148 I. C. C. 468).

It is certainly an anomalous situation that a territory with a much higher density of traffic and a much lower level of freight rates should by order of the Commission receive aid from a territory with much lower density of traffic and a much higher level of rates. In the *New England Divisions* case, *supra,* conditions were exactly the reverse. There had been a special increase in the level of rates in the New England states under the Commission's order in *Ex Parte 74, Increased Rates 1920,* 58 I. C. C. 220, and it was stated in this Court's opinion (261 U. S. 192) that there was danger that if additional increases in the rates in the New England territory were made, those rates would become so high that traffic would be diverted to auto trucks and other modes of transportation. The special increases in rates had been put in effect in New England before the New England lines were awarded an increase in divisions as between themselves and other carriers. This Court indicated (261 U. S. 196) that the order of the Commission in the *New England Divisions* case might properly be deemed a supplement to or modification of that entered in *Ex Parte 74.*

The need of the Southwestern Lines for all of their present revenues—and more—is amply demonstrated by the rates of return of the Southwestern respondents shown

in the Commission's report in the present case (R. 84). In view of this situation, the Commission should have made a proper selection of parties and required accurate and convincing evidence from the complainants, or have produced such evidence through its own representatives, before making such an order as was made in this case, where (even upon the Commission's theory, the correctness of which we vigorously dispute) the Southwestern Lines were clearly entitled to a larger relative share of the revenue from the joint rates, and where accurate tests were necessary in order to determine by what amount, if any, the Southwestern Lines were receiving unjust divisions. No such accurate and convincing evidence was adduced, but, on the contrary, as we have shown, the evidence before the Commission required so many assumptions and conjectures that it had no real probative force, and the order based thereon amounted to a deprivation of property without due process of law.

We submit that proof fundamentally as accurate as that which this Court has required in State rate cases should be required.

In the case of *Allen* v. *St. Louis Iron Mountain & Southern R. Co.*, 230 U. S. 553, a suit was brought by the St. Louis, Iron Mountain & Southern Railway Company for the purpose of enjoining the enforcement of certain intrastate rates prescribed by the Legislature of the State of Arkansas. The Iron Mountain Company made a test to determine the revenues and expenses of the intrastate business in the State of Arkansas. This Court held that the test, which was much more accurate than any evidence which was introduced before the Commission in this proceeding, was not sufficiently accurate, saying (p. 558):

It was objected, however, that the periods selected for these tests were not representative; that the month of October, 1907, in particular, was abnormal because of an unusual congestion of traffic, and that the use of the statistics for October, 1908, was also open to objection, as they did not show such a fair average of the business as would enable the court to reach a correct conclusion. The court below took this view, but it was of the opinion that proper allowances might be made which would equalize these conditions. In this view, and for the purpose of correcting assumptions deemed to be erroneous, the court defined the basis of apportionment of the various items of outlay in accordance with which new computations were made * * *.

We shall not attempt to review in detail these calculations upon which the decree is based. While they represent a most serious effort to effect a reasonable apportionment, we are convinced, from our examination of the evidence, that they have the same infirmity which was found to exist in the computations in the Minnesota and Missouri Rate cases. Simpson *v.* Shepard, *supra;* Knott *v.* Chicago, B. & Q. R. Co., decided this day (230 U. S. 474).

VII.

The Commission made findings, arrived at its conclusions, and entered its order upon assumptions of fact not supported by the evidence before it and upon matters which were not introduced in evidence.

It has been repeatedly held by this Court that it is beyond the power of the Commission to make a finding without evidence or to treat as evidence that which was not introduced in the proceeding before it as such. All the evidence before the Commission was introduced in the

court below, and is in substance incorporated in the present record. This Court has consistently held that, in a suit to set aside an order of the Commission, where all of the evidence before the Commission has been incorporated in the record on appeal, the Court will consider the objection that essential findings made by the Commission were not supported by the evidence and that the Commission considered matters not in evidence. *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91, 93; *Chicago Junction* case, 264 U. S. 258; *State of Colorado* v. *United States*, 271 U. S. 153, 166; *New England Divisions* case, 261 U. S. 184, 203; *United States* v. *Abilene & S. Ry. Co.*, 265 U. S. 274, 286.

(a) As the formula for the division of the revenue from the joint rates, the Commission prescribed an "assumed" rate prorate based upon percentages of the first-class rates under the Southwestern rate scale, which was established in the Consolidated Southwestern Cases, 123 I. C. C. 203, although neither that scale nor formula was in evidence in this proceeding before the Commission.

As hereinbefore pointed out, the Commission found that the cost of service, including a fair return on investment, was "somewhere in the neighborhood of 20 per cent. greater in the Southwest than in the Western Trunk Line group, based on averages of 1923 and 1924 operations, and somewhere in the neighborhood of 17 per cent. greater based on 1924 operations" (R. 83). But it did not prescribe divisions which would accord to the Southwestern respondents 17 to 20 per cent. more per ton per mile than to the Western Trunk Lines. It assumed that if the joint rates involved were divided as between the two groups of carriers upon percentages arrived at by the use of *assumed*

rates for the individual hauls in the two territories, the respondents in the Southwest would be accorded their just and equitable proportions of the joint revenues. These assumed rates are percentages of the first class rates under the "present Southwestern scale".

The first class rates under the "present Southwestern scale" referred to by the Commission consist of a mileage scale of rates prescribed for application, on first class traffic, between points in Southwestern territory, in *Consolidated Southwestern Cases,* 123 I. C. C. 203. The original report in that case was issued under date of April 5, 1927, and the decision did not become effective until July 14, 1928, after the issuance of a report on reconsideration (139 I. C. C. 535).

The majority of the Commission stated in its report on reconsideration in this case that the Southwestern scale was in evidence (R. 97). This is obviously erroneous, since the date of final hearing before the Commission was June 29, 1926 (R. 1103, 1069), almost a year prior to the time when the Southwestern scale was first promulgated.

The "present Southwestern scale" is a fundamental part of the formula prescribed by the Commission in this proceeding, and the use of it by the Commission without its having first been introduced in evidence, together with the proposed formula, was highly prejudicial to petitioners. Commissioner Brainerd in his dissenting opinion in the Divisions Case said (R. 92):

> Such formula was not considered by the parties in interest at the hearing but its application is proposed here for the first time.

There was no issue in the proceeding before the Commission as to the use of such a formula and scale as the basis

for determining the proper divisions of the joint rates involved, and appellants had no notice that such a basis would be used, or that the same would be considered in connection with the Commission's determination of the just, reasonable and equitable divisions of the joint rates involved. Appellants have therefore never had an opportunity to present evidence to the Commission concerning the propriety or impropriety of the use of that scale and formula in the adjustment of the divisions of the joint rates involved. Their petition for a rehearing and to introduce additional testimony was denied. They have never had an opportunity to present to the Commission any evidence as to the relationship of that scale to the cost of transporting the traffic interchanged between the respondents.

(b) The Commission neither introduced nor had before it for consideration evidence showing the cost of operation, investment, etc., confined to those portions of respondents' lines which are located within the territories involved in the divisions proceeding.

The Commission's investigation was confined to that portion of respondents' lines within Southwestern territory and Western Trunk Line territory.

The lines of respondents are not all confined to one or the other of these territories, but many of respondents have considerable mileage in other territories. For example, the Atchison, Topeka & Santa Fe Railroad[7] and the Rock

[7] The Santa Fe operates over 9,000 miles of line, none of which is in Southwestern territory with the exception of 1,200 miles in Oklahoma (R. 278). The divisions of the Santa Fe, Rock Island and Missouri Pacific on traffic via Kansas City, to and from points in Oklahoma, are not covered by the Commission's order (R. 56, 109). The Missouri Pacific and Rock Island have extensive mileage in Kansas, Colorado and other Western Trunk Line states (R. 278).

Island Railway, and the Missouri Pacific Railroad are in both Southwestern and Western Trunk Line territories, and also extend into other territories west of Southwestern territory (R. 354). Of the total mileage of 24,041 miles operated by these three railroads in 1924, only 14.36 per cent was in Western Trunk Line territory and 25.13 per cent in the Southwest (R. 354). (This does not include the Texas lines, which are operated under separate corporate names.) The systems of the Chicago, Milwaukee & St. Paul, the Chicago, Burlington & Quincy and the Chicago & Northwestern railroads all have extensive mileage in the territory west of Western Trunk Line territory as defined by the Commission. Of the total of 10,988.92 miles operated by the Milwaukee in 1924, 2555.85 miles were in territory west of Western Trunk Line territory, in Idaho, Montana and Washington. Of the total of 7,083.68 miles operated by the Chicago & Northwestern, 1,379.15 miles were in Wyoming and Nebraska (R. 353). The record does not disclose the extent of the Burlington mileage west of Western Trunk Line territory, in Nebraska, Colorado, Wyoming and Montana. It has extensive mileage west of the Missouri River (R. 278; see also Map, Exhibit A-11).

Notwithstanding the extensive mileage of these important lines in other territories, the Commission considered the expenses, revenues and investment for the entire systems of these railroads in arriving at the "constructive revenues" required in the two territories (R. 80, 82). There was no evidence before the Commission relative to the condition of, nor amount of investment in, those portions of the railroads confined strictly to the territorial groups except the data with reference to traffic density. Neither the "complainants" nor the Commission made a bona fide

effort to place such evidence in the record, although the burden of proof was upon the Western Trunk Line respondents (*United States* v. *Abilene & Southern R. Co.*, 265 U. S. 274). Nor was the evidence confined to the railroads which were made respondents herein.

The prejudice to appellants resulting from the consideration by the Commission of such inaccurate, inappropriate and wholly inapplicable evidence is shown by the admissions made by operating officials of certain Western Trunk Lines that the operating conditions were less favorable and the investment per mile of road greater on the portions of their lines in the territory west of "Western Trunk Line territory" than on the portions of those lines within that territory (Witness Harstad as to the C. M. & St. P., R. 349-50; and Witness Vilas as to the C. & N. W., R. 324). One of the principal witnesses for the Western Trunk Line respondents said (R. 278):

> I would not say the operating conditions or the general conditions were at all similar in what has been termed in this case Western Trunk Line territory and in the states of Washington, Oregon, California, Nevada, Utah, Montana and the Dakotas.

There was no evidence to the contrary.

As heretofore stated, the Commission recognized the inaccuracy and the inapplicability of the information upon which it made its principal findings[8] and attempted to justify the use of system figures by consideration of matters not of record in the proceeding before it (R. 83).

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[8] The Commission has repeatedly condemned the use of system figures in similar situations. *Wichita Northwestern Ry. Co.* v. *C. R. I. & P. Ry. Co.*, 81 I. C. C. 513, 517; *Salina & Northern R. R.* v. *A. T. & S. F. Ry. Co.*, 92 I. C. C. 475, 480; *Nevada-California-Oregon Divisions*, 73 I. C. C. 330, 335; *Missouri & North Arkansas Divisions Case*, 98 I. C. C. 119, 129.

There was no bona fide attempt to determine the relative cost and relative constructive revenue on the particular joint traffic involved in the proceeding, although that was the "precise" question which the Commission had in mind. It is intimated by the Commission that this could not be determined, but it is well known that it might have been ascertained with a fair degree of accuracy by conducting a test if by no other method. In *Northern Pacific Ry. Co.* v. *Department of Public Works,* 268 U. S. 39, this Court said (p. 43):

> A precise issue was the cost on each railroad of transporting logs in carload lots in western Washington, the average haul on each system being not more than 32 miles. In using the above composite figure in the determination of this issue the department necessarily ignored, in the first place, the differences in the average unit cost on the several systems, and then the differences on each in the cost incident to the different classes of traffic and articles of merchandise, and to the widely varying conditions under which the transportation is conducted. In this unit cost figure no account is taken of the differences in unit cost dependent, among other things, upon differences in the length of haul, in the character of the commodity, in the configuration of the country, in the density of the traffic, in the daily loaded car movement, in the extent of the empty car movement, in the nature of the equipment employed, in the extent to which the equipment is used, and in the expenditures required for its maintenance. Main line and branch line freight, interstate and intrastate, carload and less than carload, are counted alike. The department's error was fundamental in its nature. The use of this factor in computing the operating costs of the log traffic vitiated the whole

process of reasoning by which the department reached its conclusion.

(c) The Commission assumed and considered other matters and statistics not introduced as evidence.

(1) *Statistics of certain roads operating wholly in Western Territory.*

In its report on reconsideration the Commission considered the average operating revenues, average operating expenses and average hauls of the Great Northern, the Northern Pacific, the Western Pacific, and the Union Pacific (R. 106). None of these statistics were in evidence, but, as is admitted by the Commission, they were "extracted from the annual reports for 1924" (R. 106) to indicate that the conditions on those portions of the lines of the Milwaukee, the Burlington and the Chicago and North Western railroads lying west of Western Trunk Line territory are not less favorable than on the portions of those lines in Western Trunk Line territory. This assumption was not only without any evidence whatever to support it, but was, as heretofore pointed out, contrary to the only evidence of record on the subject. Substantially the same procedure upon the part of the Commission was expressly condemned by this Court in the *Orient* case, *United States v. A. & S. Ry. Co.*, 265 U. S. 274, 289.

(2) *Assumption that conditions are more favorable in Official and Mississippi Valley territories than in Western Trunk Line territory.*

In attempting to justify its use of system figures for railroads having substantial mileage outside the territories involved, the Commission said, at page 475 of its original report (R. 83):

> The Western Trunk Line group also contains systems, such as the Wabash and the Illinois Central, which extend beyond its eastern boundary into official territory with its more favorable operating conditions and, in the case of the Illinois Central, into the Mississippi Valley portion of Southern territory.

There was no evidence in the proceeding before the Commission concerning the operating conditions in Official territory or in the Mississippi Valley. This is tacitly admitted by the Commission in its report on reconsideration (R. 105-6).

(3) *Traffic densities for the year 1927 segregated by states, not in evidence.*

In its original report, the Commission used traffic density figures for the year 1927 segregated by states (R. 77). These figures were not introduced in evidence at the hearings and could not have been because the date of final hearing was June 29, 1926. At the argument it was stipulated that the "*annual reports* of all the lines may be referred to by the Commission for such information as it wishes to get from them" (R. 1266). But "annual reports" of the carriers to the Commission do not contain traffic density figures segregated by states.

The Commission recognized this in its report on reconsideration, saying (R. 101):

> The data referred to are incorporated in special reports now secured annually by our Bureau of Statistics. We believe that the stipulation was broad enough to cover these reports.

Witness Hensley testified, in the Court below, that the term "annual reports" has a well understood significance; that the annual report is an annual return made to the

Commission by the carriers giving information on a printed form prescribed by the Commission; that it does not call for a statement of the traffic density of carriers segregated as to each state, that is, showing the traffic density in each state through which the carrier operates; and that he does not make any report to the Interstate Commerce Commission as to the traffic density by states (R. 1237). (See section 20 of the Interstate Commerce Act, 41 Stat. L. 493, for provisions relative to annual reports.)

The Commission was not justified in using traffic density figures for 1927 which were not in evidence, merely to corroborate conclusions drawn from other evidence. Even if it be a fact that the figures are correct, that would not justify their use if they were not in evidence. Statements, even though true, are often subject to explanation. Under the law, appellants were entitled to have everything which the Commission considered in arriving at its conclusions introduced in evidence at the hearings before the Commission.

Respectfully submitted,

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September 29, 1930.

Exhibit A.

List of all carriers whose railroads are located, wholly or partly, in Western Trunk Line territory and Southwestern territory as those territories were defined by the Interstate Commerce Commission. This list is taken from Petitioners' Exhibit 20 (R. 1237-1244).

1. Carriers in Western Trunk Line Territory:

(The names of the carriers which were made parties in the above proceeding have been printed in italics.)

Class I:

The Atchison, Topeka and Santa Fe Railway Company.
The Baltimore and Ohio Railroad Company.
Canadian National Railways.
The Chesapeake and Ohio Railway Company.
Chicago and Northwestern Railway Company.
The Chicago and Alton Railroad Company.
Chicago, Burlington & Quincy Railroad Company.
Chicago and Eastern Illinois Railway Company.
Chicago Great Western Railroad Company.
Chicago and Illinois Midland Railway Company.
Chicago, Indianapolis and Louisville Railway Company.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

(Made party as Chicago, Milwaukee & St. Paul Railway Company (R. 1170), and no substitution made of its successor, Chicago, Milwaukee, St. Paul & Pacific Railway Company.)

The Chicago, Rock Island and Pacific Railway Company.
Chicago, St. Paul, Minneapolis and Omaha Railway Company.

The Cleveland, Cincinnati, Chicago and St. Louis Railway Company.
The Duluth and Iron Range Railroad Company.
Duluth, Missabe and Northern Railway Company.
The Duluth, South Shore and Atlantic Railway Company.
Elgin, Joliet and Eastern Railway Company.
Erie Railroad Company.
Grand Trunk Railway System.
Great Northern Railway Company.
Green Bay and Western Railroad Company.
Illinois Central Railroad Company.
Lake Superior & Ishpeming Railroad Company.
Louisville and Nashville Railroad Company.
The Michigan Central Railroad Company.
The Minneapolis & St. Louis Railroad Company.
Minneapolis, St. Paul & Sault Ste. Marie Railway Company.
Missouri-Kansas-Texas Railroad Company.
Missouri Pacific Railroad Company.
Mobile & Ohio Railroad Company.
The New York Central Railroad Company.
The New York, Chicago and St. Louis Railroad Company.
Northern Pacific Railway Company.
The Pennsylvania Railroad Company.
Pere Marquette Railway Company.
Quincy, Omaha & Kansas City Railroad Company.
The St. Joseph and Grand Island Railway Company.
St. Louis Southwestern Railway Company.
Southern Railway Company.
Toledo, Peoria & Western Railway Company.
Union Pacific Railroad Company.
Wabash Railway Company.

CLASS II:

Alton & Eastern Railroad Company.
Chicago, Springfield & St. Louis Railway Company.
Copper Range Railroad Company.
Davenport, Rock Island and Northwestern Railway Company.
Duluth & Northeastern Railroad Company.
Escanaba and Lake Superior Railroad Company.
Farmers Grain and Shipping Company.
Illinois Terminal Company.
Jacksonville & Havana Railroad Company.
Jefferson Southwestern Railroad Company.
Kewanee, Green Bay and Western Railroad Company.
LaCrosse and Southeastern Railway Company.
Litchfield and Madison Railway Company.
Manistique and Lake Superior Railroad Company.
Marinette, Tomahawk & Western Railroad Company.
Midland Continental Railroad.
Mineral Range Railroad Company.
Mineral Point and Northern Railway Company.
Minneapolis, Northfield and Southern Railway.
Minneapolis & Rainy River Railway Company.
Minneapolis, Red Lake and Manitoba Railway Company.
Minnesota, Dakota & Western Railway Company.
Minnesota and International Railway Company.
Minnesota Western Railroad Company.
Missouri-Illinois Railroad Company.
Paducah & Illinois Railroad Company.
Rock Island Southern Railway Company.
St. Louis and Hannibal Railroad Company.
The St. Louis and O'Fallon Railway Company.
St. Louis and Ohio River Railroad.
Wisconsin & Michigan Railroad Company.

CLASS III:

Atlantic Northern Railway Company.
Cape Girardeau Northern Railway Company.
Cezenovia Southern Railroad Company.
The Ettrick & Northern Railroad Company.
The Galesburg and Great Eastern Railroad Company.
Hanover Railway Company.
Hillsboro and Northeastern Railway Company.
Hoophole, Yorktown and Tampico Railroad Company.
Houghton, Chassell & Southwestern Railway.
The Kansas & Sidell Railroad Company.
Laona & Northern Railway Company.
Macomb, Industry & Littleton Railway Company.
Manchester and Oneida Railway Company.
Ontonagon Railroad Company.
Peoria, Hanna City & Western Railway Company.
Rapid City, Black Hills & Western Railroad Company.
Rockport, Langdon & Northern Railway Company.
Rutland, Toluca & Northern Railroad Company.
Shelby County Railway Company.
Superior & Southeastern Railway Company.
Tabor and Northern Railway Company.
The Westfield Railroad Company.
Yale Short Line Railroad Company.

2. CARRIERS IN SOUTHWESTERN TERRITORY:

(The names of the carriers which were made parties in the above proceeding have been printed in italics.)

CLASS I:

The Atchison, Topeka and Santa Fe Railway Company.
The Beaumont, Sour Lake & Western Railway Company.
The Chicago, Rock Island and Gulf Railway Company.
The Chicago, Rock Island and Pacific Railway Company.

Fort Smith and Western Railway.
Fort Worth and Denver City Railway Company.
Fort Worth & Rio Grande Railway Company.
Gulf, Colorado and Santa Fe Railway Company.
International-Great Northern Railroad Company.
The Kansas City, Mexico and Orient Railway Company.
Kansas City, Mexico and Orient Railway Company of Texas.
The Kansas City Southern Railway Company.
Kansas, Oklahoma & Gulf Railway Company.
Kansas, Oklahoma & Gulf Railway Company of Texas.
Louisiana & Arkansas Railway Company.
Louisiana Railway and Navigation Company.
Louisiana Railway & Navigation Company of Texas.
Midland Valley Railroad Company.
Missouri-Kansas-Texas Railroad Company.
Missouri-Kansas-Texas Railroad Company of Texas.
Missouri and North Arkansas Railway Company (W. Stephenson, Receiver).
Missouri Pacific Railroad Company.
New Orleans, Texas & Mexico Railway Company.
Panhandle and Santa Fe Railway Company.
The St. Louis, Brownsville and Mexico Railway Company.
St. Louis-San Francisco Railway Company.
St. Louis, San Francisco and Texas Railway Company.
St. Louis Southwestern Railway Company.
St. Louis Southwestern Railway Company of Texas.
San Antonio, Uvalde & Gulf Railroad Company.
Texarkana and Fort Smith Railway Company.

(This company was excluded from the list of respondents in the supplemental order (R. 1220-1221), since it had not been made a party to the proceeding.)

Texas and New Orleans Railroad Company.
The Texas Mexican Railway Company.

The Texas and Pacific Railway Company.
The Trinity and Brazos Valley Railway Company (John A. Hulen, Receiver).
The Wichita Valley Railway Company.
The Yazoo and Mississippi Valley Railroad Company.

CLASS II:

Abilene and Southern Railway Company.
Arkansas & Louisiana Missouri Railway Company.
Ashley, Drew & Northern Railway Company.
Blytheville, Leachville & Arkansas Southern Railroad Company.
Brimstone Railroad & Canal Company.
Cisco & Northeastern Railway Company.
Deering Southwestern Railway.
DeQueen and Eastern Railroad Company.
Galveston, Houston and Henderson Railroad Company.
Graysonia, Nashville & Ashdown Railroad Company.
Groveton, Lufkin & Northern Railway Company.
The Gulf & Sabine River Railroad Company.
Gulf, Texas & Western Railway Company (W. Frank Knox, Receiver).
Houston and Brazos Valley Railroad Company.
The Louisiana and North West Railroad Company.
Miami Mineral Belt Railroad Company.
Mississippi River and Bonne Terre Railway.
Missouri-Illinois Railroad Company.
Missouri Southern Railroad Company.
New Iberia & Northern Railroad Company.
Northeast Oklahoma Railroad Company.
Oklahoma City-Ada-Atoka Railway Company.
Oklahoma-Southwestern Railway Company.
Oklahoma Union Railway Company.
Okmulgee Northern Railway Company.
The Orange & Northwestern Railroad Company.
Osage Railway Company.

Paris and Mt. Pleasant Railroad Company (R. W. Wortham, Receiver).
The Prescott and Northwestern Railroad Company.
Quanah, Acme & Pacific Railway Company.
Reader Railroad.
Red River and Gulf Railroad.
Rio Grande and Eagle Pass Railway Company.
Roscoe, Snyder and Pacific Railway Company.
San Antonio Southern Railway Company.
San Benito & Rio Grande Valley Railway Company.
The Slago & Eastern Railroad Company.
Sugar Land Railway Company.
Texas Southeastern Railroad Company.
Texas, Oklahoma & Eastern Railway Company.
Tremont & Gulf Railway Company.
Waco, Beaumont, Trinity & Sabine Railway Company.
The Weatherford, Mineral Wells & Northwestern Railway Company.
Wichita Falls & Southern Railroad Company.

CLASS III:

Angelina & Neches River Railroad Company.
Aransas Harbor Terminal Railway.
Arkansas Railroad Company.
Arkansas Short Line.
The Arkansas Western Railway Company.
Asherton and Gulf Railway Company.
Asphalt Belt Railway Company.
Augusta Railroad Company.
Bartlett Western Railway.
Bauxite & Northern Railway Company.
Beaver, Meade and Englewood Railroad Company.
Brookings & Peach Orchard Railroad Company.
Caddo & Choctaw Railroad Company.
Cairo, Truman & Southern Railroad Company.
Cape Girardeau Northern Railway Company (Clarence L. Grant, Receiver).

Caro Northern Railway Company (W. M. Ross, Receiver).
Central Railway Company of Arkansas.
Christie & Eastern Railway Company.
Dardanelle & Russellville Railroad Company.
The Denison and Pacific Suburban Railway Company.
Doniphan, Kensett & Searcy Railway.
Eastland, Wichita Falls & Gulf Railroad Company.
East Texas and Gulf Railway Company.
El Dorado and Wesson Railway Company.
Fordyce and Princeton Railroad Company.
Fort Smith, Subiaco & Rock Island Railroad Company.
Fredericksburg & Northern Railway Company.
Gideon and North Island Railroad Company.
Grand Prairie-Branch Railroad Company.
Gulf & Northern Railway Company.
Hamlin & Northwestern Railway Company of Texas.
Jefferson & Northwestern Railway Company.
Kinder & Northwestern Railroad Company.
Leesville, Slagle and Eastern Railway Company.
The Louisiana & Pine Bluff Railway Company.
Louisiana Southern Railway Company.
Lufkin, Hemphill and Gulf Railway Company.
Manila & Southwestern Railway Company.
The Mansfield Railway & Transportation Company.
Marshall, Elysian Fields and Southeastern Railway Company.
Montana Railroad.
Moscow, Camden & San Augustine Railroad.
Murfreesboro-Nashville Southwestern Railway Company.
The Nacogdoches & Southeastern Railroad Company.
The Natchez, Urania and Ruston Railway Company.
North Louisiana & Gulf Railroad Company.
Oakdale & Gulf Railway Company.
Oklahoma & Rich Mountain Railroad Company.

Ouachita and Northwestern Railroad Company.
The Pecos Valley Southern Railway Company.
Pittsburg County Railway Company.
Port Isabel & Rio Grande Valley Railroad.
Rio Grande City Railway Company.
Rio Grande, Micolithic and Northern Railway.
The Roby and Northern Railroad Company.
Rockdale, Sandow & Southern Railway.
Sabine & Neches Valley Railway Company.
The Sibley, Lake Bisteneau & Southern Railway Company.
Shreveport, Houston & Gulf Railroad Company.
Texas-New Mexico Railway Company.
Texas Short Line Railway Company.
Thornton and Alexandria Railway Company.
Trinity Valley & Northern Railway Company.
Trinity Valley Southern Railroad Company.
The Union Traction Company (John F. Layng, Receiver).
Uvalde & Northern Railway Company.
Warren & Ouachita Valley Railway Company.
Warren & Saline River Railroad Company.
(R. 1238-1244.)